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Parker Jensen, Barbara Jensen and Daren Jensen v. Kari Cunningham, Richard Anderson, Lars M. Wagner, Karen H. Albritton, and Susan Eisenman : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

PARKER JENSEN, a minor, by and through his parents and natural guardians, BARBARA and DAREN JENSEN; BARBARA JENSEN, individually; and DAREN JENSEN, individually, Appellants, vs. KARI CUNNINGHAM, in her individual capacity; RICHARD ANDERSON, in his individual and official capacities; LARS M. WAGNER, in his individual capacity; KAREN H. ALBRITTON, in her individual capacity; SUSAN EISENMAN, in her individual capacity, Appellees.	Case No. 20090277-SC

APPEAL FROM AN ORDER GRANTING SUMMARY JUDGMENT
HON. JOSEPH C. FRATTO, JR.
THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

REPLY BRIEF OF APPELLANTS

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STATEMENT REGARDING FACTS[1]

Space constraints preclude the Jensens from pointing out the many areas of dispute in the appellees' fact statements. Ironically, at the same time that the appellees are arguing that the federal court's ruling resolved all facts necessary for the lower court to rule on the Jensens' state law claims, they simultaneously ask this Court to consider portions of the record not cited in the federal court's ruling. *See, e.g.,* Wagner/Albritton Brief, p. 7 n.2 (citations in defendants' fact statement designated as other than to FC-R are "added" facts from the record). That is what the Jensens asked the trial court to do – review the record, and apply it to the Jensens' state law claims.

Nonetheless, a few examples illustrate the existence of fact disputes even under the appellees' own record citations:

A critical issue in this case is whether the Jensens were trying to get confirmation of the diagnosis (as they say), or insisting on experimental treatment (as the appellees say). This is crucial because even the appellees do not argue that, under the state constitution, a child can be taken removed from parents who are following the recommendations of a licensed physician to seek reasonable confirmatory testing. Accordingly, the only way appellees can argue that their actions were narrowly tailored to serve a compelling state interest is by claiming that the Jensens were not questioning the diagnosis when Wagner reported them to DCFS. Thus, Wagner/Albritton's brief says:

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[1] For brievity, the Jensens refer to appellees Wagner and Albritton as "Wagner/Albritton," and Anderson, Cunningham, and Eisenman as "the DCFS Defendants."

> At the [June 9, 2003] meeting, the Jensens never mentioned genetic testing; they raised no questions about it. (FC-R. 96-97.) The subject never came up, because the Jensens were not questioning the diagnosis – only the treatment – as they were opposed to conventional chemotherapy treatment. Id. *[Wagner/Albritton Brief at 19.]*

The only record cite offered for this "undisputed" fact was testimony of appellee Wagner's supervisor, Dr. Lemons, that Wagner never told him that the family had requested molecular or genetic testing. In other words, Wagner/Albritton's sole citation for the proposition that the Jensens were not questioning the diagnosis was Wagner's failure to tell others that they were questioning the diagnosis – one of the very omissions upon which the Jensens base their claim.

Not only is this assertion unsupported, but it ignores rather overwhelming evidence to the contrary. For example: Wagner does not dispute that the Jensens requested a second opinion from Dana-Farber because they wanted to confirm the diagnosis. (*See* Appellants' Brief at 8.) Wagner/Albritton acknowledged below that, on June 9, the Jensens asked about the language of the pathology test, and "[t]he Jensens suggested that because the tumor did not appear in the bone, as Ewing's sarcoma usually does, then it may not be Ewing's sarcoma." (R. 404, 2365.) The Jensens asked at this meeting for another sample of Parker's tissue to be tested, and were refused. Barbara Jensen stated that "PCMC keeps jumping to treatment," and Daren Jensen said, "We are doing A, B, C, and he was doing A and then Z." (R. 2161, 2435; *see also* 2411-12, 2422-23; Brief of Appellants, pp. 11, 13.)

Another pivotal event in this case involved DCFS liaison David Corwin's attempt to schedule a meeting between him, Wagner, the Jensens, and the Jensens' doctor who was questioning the diagnosis. This meeting would have afforded an opportunity for the

Jensens to explain to a neutral party their request for confirmatory testing, which Wagner implied to Corwin had already been done. The Jensens and Corwin agreed to meet, but Wagner refused and instead reported the Jensens to DCFS, misrepresenting – repeatedly – that it was the Jensens who refused to meet. (*See* Brief of Appellants, pp. 12-13, 74.) This obviously cannot be considered "narrowly tailored" conduct under the state constitution; hence, appellees recharacterize it more favorably to themselves:

> Dr. Corwin and Mr. Jensen unsuccessfully attempted to schedule a further meeting to discuss the situation. (FC-R. 122.) [R. 515 (Ex. 29, pp. 103-105, 111-112, 119-121; Ex. 31; Ex. 4, pp. 231-232).] At that point, the decision was made to refer PJ's case to DCFS to medical neglect in refusing what the doctors believed was medically necessary treatment. (FC-R. 122-123.) Id. *[Wagner/Albritton Brief at 21.]*

Appellees assert numerous other examples of "undisputed" facts that are quite obviously disputed. For example: They move up the date when the lump was first noticed (because the much earlier date is inconsistent with a fast-growing cancer) (R. 1132, 3283, 2332-34); claim that it had grown and changed color (not true, *see* R. 2333-34); state that Ewing's "may" be diagnosed through cytogenetic / molecular testing that "often" reveals an 11;22 translocation, when all witnesses agreed that such testing is the gold standard for diagnosing Ewing's, and an 11;22 is found in 95 percent of Ewing's patients (*see* Appellants' Brief, pp. 5, 15; R. 392, 515 (Ex. 62, p.2), 1271 (p. 17), 2668, 3205, 3360; Wagner/Albritton Brief, p. 10); state that the Burzynski Clinic had no experience with pediatric Ewing's Sarcoma, when it is undisputed that it did treat the synonymous "PNET outside the central nervous system" and "soft tissue sarcoma" (R. 3134-35); state that the clinic only did FDA clinical trials, when that was only one department within the clinic (R. 3125, 3631-38); claim that the AEWS0031 Clinical Trial

did not influence Wagner's actions when Wagner himself testified that he refused genetic testing because it was not required by the Clinical Trial (R. 3180; *see also* 3164-65, 3196; Appellants' Brief, pp. 5, 15); state that Wagner had no motivation to make misrepresentations after the Clinical Trial enrollment deadline passed, when there was evidence that the deadline he was using did not pass until June 20, and Wagner had already gone public with his allegations by that point and could not simply say, "Nevermind." (R. 3378, 3386; *see* Appellants' Brief, p. 6.)

Wagner/Albritton further state:

> Dr. Coffin's diagnostic method and analysis met the standard of care, according to Dr. Christopher D. M. Fletcher, a world expert in diagnosing soft tissue sarcomas. [R. 515 (Ex. 21; Ex. 22, pp. 19, 95, 127).] *[Wagner/Albritton Brief at 12.]*

This testimony is, again, characterized in the manner most favorable to Wagner and Albritton. Dr. Fletcher (their expert witness) actually admitted that what the pathologists did was the *least* that could be done and still meet the minimum standard of care. (R. 2073-74). More fundamentally, this statement disregards the testimony of every medical witness below (except Wagner) that, regardless of whether Wagner personally felt that genetic testing was necessary, it was appropriate and reasonable for the Jensens to seek such testing for their child. (*E.g.,* R. 1500-02, 1759-60, 3360.)

Another important factor in the Jensens' state constitutional claims is that Wagner reported the Jensens after being informed that they were going to seek out another hospital to obtain the requested diagnostic testing. Because that would be inconsistent with appellees' claim that the Jensens were simply refusing treatment, their brief states: "The Jensens left the meeting, telling the PCMC representatives, "You're fired." (FC-R. 122) [R.

515 (Ex. 1, p. 181).] and leaves out the immediately preceding key words. Quoted in full, the Jensens said, "We're going to go find another hospital that will work with us. You're fired." (R. 2412 (emphasis added).)

Another key aspect of the Jensens' state constitutional claims is that appellees Eisenman and Cunningham did not tell the juvenile court that L. A. Children's genetic test results were not yet back when they obtained custody of Parker. This is important because, as the juvenile court had stated, those results were to be controlling of Parker's care.[2] To avoid the consequence of this fact, appellees state:

> On July 18, 2003, Dr. Tishler was told by CHLA pathologist, Dr. Gonzales, that he had diagnosed PJ's tissue as Ewing's sarcoma, and that the final results of his analysis would follow in a few days. [R. 515 (Ex. 41, pp. 43-44; Ex. 44, p. 2).].... Per the [July 10, 2003] stipulation, the Jensens traveled to Los Angeles, where PJ met with Dr. Tishler on July 21, 2003. (FC-R. 125) [R. 515 (Ex. 41, p. 25).] Dr. Tishler told the Jensens that based on the pathology tests done at LabCorp, PCMC and University of Washington and from what he was told by Dr. Gonzales, that: "The results are likely nonequivocal and indicate the presence of a high grade malignant lesion." [R. 515 (Ex. 43, p. 10).] *[Wagner/Albritton Brief, pp. 25-26.]*

Tishler actually testified that, while the date on the (immunohistochemical) pathology report pre-dated the Jensen meeting, he had not seen the report when he met with the Jensens, and everything he said to the Jensens on May 21 was based on the outside facility's information. He further said that, even if he had received preliminary information about PJ's tissue, he would never have mentioned incomplete or unfinished testing to the Jensens. Tishler reiterated in court on July 28, 2003, that genetic testing was not complete,

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[2] This was factual knowledge by Eisenman, because she was the last to have communication with Tishler, and knew that he had not reported any test results.

and stated in his deposition that he might never have seen the pathology report. (R. 3088-89, 3165-67.)

Wagner/Albritton further state:

> [B]ased on Dr. Tishler's testimony, the juvenile court ordered that PJ commence chemotherapy before August 8, 2003, without regard to the CHLA test results. (FC-R. 126.) [R. 515 (Ex. 10, pp. 237-240).] *[Wagner/Albritton Brief at 27.]*

To the contrary, Dr. Tishler stated repeatedly that he would not be making any final recommendations until after his test results were in, and the juvenile court scheduled the anticipated start date for chemotherapy only after receiving an estimate of when those results would be back. (R. 515 (Ex. 33c, pp. 23-24, 60, 62, 63-66), 3562, 3703.) The juvenile court also ruled that the Jensens would be given an evidentiary hearing on August 20 "in the event P.J.'s situation was not yet resolved." (Wagner/Albritton Brief at 29, citing (FC-R. 127) [R. 515 (Ex. 10, pp. 238-239)].)[3]

Perhaps most typical of the appellees' approach to the facts is Wagner/Albritton's attempt to explain the inconvenient fact that Parker Jensen is alive and well seven years after he was supposed to be dead within "two weeks." Parker has a "90% chance or greater of eventually developing metastatic disease," they say, and "will more than likely eventually die from Ewing's sarcoma." (Wagner/Albritton Brief, p. 40) But the only record citation is to their expert's testimony regarding general statistics; he expressly testified that he could not render any opinion as to Parker's prognosis because he lacked sufficient information.

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[3] The Guardian ad Litem's notes were that the juvenile court ruled that LACH's test results were to be "determinative." (R. 3481-83, 3620.) Presumably, considering that no minutes or order were available until after the Jensens had been accused of violating the order, it was reasonable for the Jensens to interpret the judge's oral ruling the same way as the GAL.

(R. 515 (Ex. 19, pp. 112-117).) Appellees also ignore the October 8, 2003, testimony of Dr. Johnston in Boise, who was personally involved in PJ's case, that "if [Parker] could get to the point where he was about three years out from the beginning of treatment...at that point, if the tumor has not come back, it almost certainly will not come back." (R. 3575.)

ARGUMENT

I. APPELLEES HAVE NOT MET THEIR BURDEN OF ESTABLISHING THE AFFIRMATIVE DEFENSE OF *RES JUDICATA*.

Appellees' briefs have not rectified any of the fatal flaws in the trial court's ruling. First, although the DCFS Defendants cite a few cases in which intermediate state courts appear to use *res judicata* language regarding issues in a single case (and some that do not)[4], application of the doctrine in this case is governed by Tenth Circuit law, under which *res judicata* is inapplicable to claims or issues in a single case. *McIlravy v. Kerr-McGee Coal Corp.*, 204 F.3d 1031, 1034 n.1 (10th Cir. 2000) ("Res judicata does not speak to direct attacks in the same case, but rather has application in subsequent actions.") Appellees do not challenge that law. Indeed, Wagner/Albritton conceded as much at the hearing below. *See* R. 4220 (Transcript) at 6, Reply Add.Exh. 2 ("The plaintiffs have pointed out, and I think technically correctly, that res judicata, technically, may not apply within the same case.")[5]

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[4] *See, e.g., Vines v. Univ. of Louisiana at Monroe*, 398 F.3d 700 (5th Cir. 2005) (multiple actions).

[5] Wagner/Albritton argue that one vs. two cases is a "distinction without a difference." The Tenth Circuit apparently feels otherwise. Moreover, the only case cited by

On appeal, both sets of appellees urge that the federal court's ruling imposed a "mandate" that the state court must follow as "law of the case." (Wagner/Albritton brief at 56-57; DCFS Defendants' brief at 31.) Although this argument would not affect the outcome, *see infra*, the Jensens note that it was not preserved below. None of the defendants mentioned law of the case in their summary judgment motions or supporting memoranda. (R. 281, 947, 1012, 1076, 1030, 1083, 1086, 1089.)

When Wagner/Albritton belatedly attempted to raise law of the case for the first time in their reply memorandum (R. 4190), the Jensens objected. The Jensens' counsel noted that, had law of the case been raised, they would have briefed the matter differently. (*See* R. 4220 (Transcript) at 42, Reply Add.Exh. 2.) For example, counsel stated, the Jensens would have argued that law of the case would be discretionary as to the state claims, *see, e.g., Mid-America Pipeline Co. v. Four-Four, Inc.*, 216 P.3d 352, 2009 UT 43, ¶ 12 ("While a case remains pending before the district court prior to any appeal, the parties are bound by the court's prior decision, but the court remains free to reconsider that decision. It may do so sua sponte or at the suggestion of one of the parties"); *Farr v. Hughes*, 2009 UT App 161 (mem. dec.)("It is true that 'under the law of the case doctrine, a decision made on an issue during one stage of a case is binding in successive stages of the same litigation.' However, even after granting summary judgment, 'the [trial] court remains free to reconsider that decision.'") (citations omitted).

Wagner/Albritton, *Oman v. Davis School Dist.*, 2008 UT 70, 194 P.3d 956, involved a plaintiff who brought a state action after losing in federal court – *i.e.,* two cases.

Additionally, the Jensens' counsel noted that, if law of the case were at issue, they would have argued that the defendants were precluded from rearguing adverse legal rulings issued by the federal court, such as Judge Cassell's legal determination that the *Spackman* elements are satisfied in this case (*see* Reply Add.Exh. 1 at 28-31), and that the Jensens' three remaining state constitutional claims are cognizable independent of the Jensens' federal claims. *See* R. 4220 (Transcript) at 43, Reply Add.Exh. 2; *id.* ("had they argued law of the case, we would have said great, that just saved us 20 pages of arguing the history of the State Constitution"). The trial court confined its ruling to the defendants' arguments on *res judicata*. (R. 4206.)

Frankly, reframing their argument does not help appellees in any event, because the only "mandate" offered by the federal court regarding the state constitutional claims is that they "present important questions of state law" that should be decided by the state court – hardly an indicator that the state court should consider its hands tied.

More important, the appellees continue to go about this whole process backwards. Although the Jensens have extensively explained why state constitutional protections are broader than the federal, that is not actually their obligation. Federal law (which governs application of *res judicata* to federal rulings) is quite clear: Whether they are arguing claim or issue preclusion, it is the defendants' burden to prove that the issues or claims are identical, not the plaintiff's burden to prove that they are not. *See* Brief of Appellants, pp. 63, 66; *Valley View Angus Ranch, Inc. v. Duke Energy Field Services, Inc.*, 497 F.3d 1096, 1107 (10th Cir. 2007)(reversing grant of summary judgment where the "[defendant] has failed to bear its burden to affirmatively prove the defense of issue

preclusion"); *Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1093 (10th Cir. 2003)(defendants have the burden of establishing issue preclusion, including identity of issues).

In the trial court and on appeal, the Jensens explained at length how the evidence would support a violation of specific state constitutional provisions. Appellees have not done the converse, analyzing what issues would be pertinent to (let alone dispositive of) these same provisions.[6]

Thus, for example, appellee Anderson suggests that the federal court's finding that he did not act with "deliberate indifference" precludes one or more of the Jensens' state claims. How? Is deliberate indifference a threshold requirement on any of the Jensens' state constitutional claims? Anderson makes no attempt to show that it is.

Regarding his alleged material omissions, Anderson cites a statement by the federal court that "Plaintiffs did 'not direct[] the Court to evidence that Mr. Anderson knew the Juvenile Court was unaware of the possibility of genetic testing or that genetic tests were 'definitive,'" and "Plaintiffs had adduced no evidence that Anderson understood" that a stipulation had been violated," etc. Again, this misapprehends the parties' burdens. In state court, Anderson is required to affirmatively demonstrate the absence of a fact issue. "[U]nless the moving party meets its initial burden to present evidence establishing that no genuine issue of material fact exists, 'the party opposing the motion is under no obligation to demonstrate that there is a genuine issue for trial.'"

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[6] Similarly, the appellees did not provide to the lower court any analysis of the elements of the Jensens' common law claims, and whether or how issues decided by the federal court would have any bearing on them.

Orvis v. Johnson, 2008 UT 2, 177 P.3d 600 (unlike federal law, Utah law does not allow a summary judgment movant to merely allege a lack of evidence in the nonmoving party's case, but instead requires a movant to affirmatively provide factual evidence establishing that there is no genuine issue of material fact) (citations omitted)).

Appellee Cunningham's argument is equally noncompliant with applicable standards when seeking summary judgment based upon *res judicata*. For example, Cunningham cites a factfinding by the federal court that any misrepresentations she made were not "deliberate" – an assessment of a party's mental state that would be improper under state law – but would that dispose of the Jensens' claims against her? The Jensens have argued that recklessness is sufficient for a state constitutional claim – reckless actions are by definition not "narrowly tailored" – and the federal court made no findings regarding recklessness. Cunningham does not address any of these issues.

Like all of the other defendants (and the trial court), Cunningham simply assumes that whatever barred the Jensens' federal constitutional claims against her automatically bars their state constitutional claims, even though this Court has stated that the federal constitution sets the floor, not the ceiling, of constitutional protections for Utahns. *See, e.g., Anderson v. Provo City Corp.*, 2005 UT 5, ¶ 17, 108 P.3d 701. Assumptions do not even come close to meeting a defendant's burden of proving that issues or claims are identical, as required to prevail on an affirmative defense of *res judicata*.

Appellee Eisenman similarly fails to make any attempt to show that the scope and effect of the issues are identical in the Jensens' federal and state claims. (She does make an alternative *de novo* argument for immunity under state law, which is addressed *infra*.)

Instead, Eisenman recites certain rulings by the federal court and then simply says, in effect, "These rulings must dispose of the state claims, too," with no further analysis.

Wagner and Albritton's positions are even less clear. What issues are dispositive of the state constitutional claims against them, and why? They do not say. Can judgment on the state constitutional claims be sustained solely on the federal court's ruling, or must the trial court also review Wagner/Albritton's additional record citations? They do not say. (If it is the latter, then the ruling was erroneous on its face, as the trial court admittedly conducted no review of the record at all, let alone of the Jensens' competing citations.)

In short, the appellees' arguments do not address, let alone satisfy as a matter of law, any of the applicable standards – (1) the federal *res judicata* requirement of affirmatively proving that the issues/claims are identical; (2) this Court's requirement that a defendant affirmatively demonstrate entitlement to summary judgment, rather than baldly stating that the plaintiff cannot prove their case, *Orvis, supra*; or (3) the primacy approach to state constitutional analysis, in which the state constitution is reviewed independently, and federal law is no more controlling than law from sister states. *See* Brief of Appellants, pp. 37-39, 42-43.[7]

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[7] To illustrate the error in the appellees (and the trial court's approach), assume that a plaintiff has a federal statutory claim, and state breach of contract, negligence, and negligent misrepresentation claims. The federal court issues certain factual rulings dispositive of the federal statutory claim, and then remands the state claims. No defendant would argue that it satisfies his burden of proof on *res judicata* to file a motion that said, "The trial court issued this ruling. It disposes of the plaintiffs' breach of contract, negligence, and negligent misrepresentation claims," without analyzing the

In the absence of any effort by the defendants to prove which issues would be dispositive of which state constitutional claim(s), or why, the trial court was left with a generic contention that all of the Jensens' state constitutional claims are identical to all of their federal claims, and therefore all of the issues must automatically be the same. And that is essentially what the trial court ruled:

> [T]he issues in this case arise from a single, distinct set of events and as demonstrated by the Memorandum Decision of Judge Stewart, the factual contentions that underlie the Plaintiffs' state law claims against the Defendants have been conclusively decided. This said, Judge Stewart's legal conclusions bar Plaintiffs' claims under the Utah Constitution because there is no historical or textual basis for interpreting Utah's Constitutional provisions in this case differently from the Federal Constitution. Moreover, no Utah appellate decision supports interpreting the Utah Constitution to provide broader or different rights in this case.
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> * * *
>
> In sum, the facts, the alleged harm, and the analysis of plaintiffs' state law claims are the same as those already considered and dismissed by Judge Stewart and, there being no additional or different rights provided by the Utah Constitution, dismissal is appropriate in this forum as well.

R. 4203 (emphases added).

On appeal, Wagner/Albritton urge this Court to adopt a similar blanket approach, stating:

> As established below, there is no material difference between these rights under the U. S. Constitution and the Utah Constitution. Since the rights and claims are identical, so are the underlying factual and legal issues.

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elements of each claim and why the federal court's ruling disposed of them as well. Yet that is what appellees have done with respect to the Jensens' state constitutional claims.

(Wagner/Albritton Brief at 45 (emphasis added).) But that improperly shifts the burden on Wagner/Albritton's affirmative defense to the Jensens.[8]

The appellees do state in passing that the Jensens' state and federal claims are identical. However, their principal support for this assertion is not affirmative analysis, but merely a complaint that the Jensens have not cited Utah cases involving similar facts (as if these facts could ever be duplicated). It is a reality that many litigants – including the appellees – do not independently brief state constitutional claims, and this Court has never imposed the Catch-22 requirement of a factually similar Utah case finding greater protection before the Court can find greater protection. As in all areas of the law, parties and courts extrapolate from existing precedent (including some "antiquated" cases, as the DCFS Defendants put it, which reflects how long these principles have been recognized).

Moreover, other than dismissing it as an "irrelevant discourse of Utah history," the appellees do not challenge the Jensens' analysis of the motives, backgrounds, experiences, wording choices, and authority influential to the state constitution's Framers, nor their case law from other jurisdictions and commentary, all of which considerations this Court has endorsed when addressing the scope of state constitutional protections (and other legal issues, for that matter).

Nor do the appellees contest the principles elucidated in the Utah cases that are cited by the Jensens, or explain why the broader protections afforded to such activities as

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[8] On appeal, the DCFS Defendants acknowledge that the Jensens' state and federal claims are not identical (DCFS Defendants' Brief, p. 31), which in itself demonstrates error in the trial court's analysis.

board of pardons proceedings or the conducting of a business would be denied to the far greater fundamental right of caring for one's child. In short, the Jensens' analysis of the breadth of the Utah Constitution's protections is essentially unchallenged. The appellees' few arguments regarding specific constitutional provisions are addressed here:

A. Inherent / inalienable rights, Art. I, § 1.

Wagner/Albritton argue that claims involving familial association / direction of medical care should be limited to Art. I, § 7 (due process), because in an earlier case involving a court proceeding, this Court addressed the issue under § 7. Of course, not all of the defendants' actions were confined to the juvenile court proceeding itself. In any event, the same conduct often creates potential liability under more than one theory (*e.g.*, bad faith and fraud). As long as double recovery is avoided, the plaintiff may present both causes to the jury.

B. Due Process, Art. I, § 7.

Appellees state that Utah and federal due process rights are the same, but offer no explanation why, other than mentioning that this Court has sometimes found them to be the same, and sometimes found them not to be. (Wagner/Albritton Brief, pp. 61-62.) The Jensens' analysis of why they are in fact different in this case is unchallenged.

Elsewhere in their brief, Wagner/Albritton argue that "[t]he Jensens' core contention that the government cannot dictate a child's medical treatment is misguided." (Wagner/Albritton Brief at 41.) According to Wagner/Albritton, the sole issue is that "[the Jensens] believe that it was their decision alone to either not treat P.J. or treat him with Insulin Potentiation Therapy, whose efficacy and safety had not been proven." *Id.*

"[T]he juvenile court has the power and duty to order that a child be treated with standard curative therapy to save his life," they argue. *Id.* at 42.

Apart from the fact these contentions are unsupported by analysis or authority, they do not aid the appellees because they have nothing to do with the Jensens' actual claims: that the Jensens had a state constitutional right to follow the recommendation of a licensed physician that they seek readily available, reliable diagnostic testing without being reported to DCFS for doing so, and without having appellees force them to choose one physician over another or take custody of their child based upon material misrepresentations and omissions.[9]

C. Art. I, § 14.

Wagner/Albritton argue that the Jensens' rights under Art. I, § 14 are the same as the Fourth Amendment, because one of the cases cited by the Jensens, *State v. Bean*, 869 P.2d 984 (Utah 1994), "is a seizure case, so it does not apply here because the Jensens were never physically seized." (Wagner/Albritton Brief at 62.) Apart from the fact that this is just another "We disagree" argument rather than affirmative analysis, the Jensens were seized (Daren was arrested, and he and Barbara were both booked into jail). Moreover, Wagner/Albritton ignore entirely the Jensens' arguments as to why the

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[9] Wagner/Albritton say that their point in this case is "prove[d]" by the asserted fact that the child at issue in a 1979 case cited by the Jensens later died from Hodgkin's disease. Of course, it is unknown whether the state-requested treatment would have made any difference to that outcome. (If the defendants had succeeded in forcing unneeded chemotherapy on Parker Jensen, undoubtedly they would now be claiming that they "cured" him.) However, if Wagner/Albritton contend that the correctness of the parties' position is proved by the outcome, the fact that Parker is in Chile serving a mission seven years after he was supposed to be dead would seem to refute their own argument.

restraints to which they were subjected would unquestionably be considered a seizure under the Utah Constitution. *See* Brief of Appellants, pp. 60-62.

The DCFS Defendants argue that there is nothing in Utah's history that would support greater rights under § 14 than under the Fourth Amendment. More specifically, they argue that the polygamy prosecutions are irrelevant, citing Paul G. Cassell, "Search and Seizure and the Utah Constitution, The Irrelevance of the Antipolygamy Raids," 1995 B.Y.U.L.REV. 1. Ironically, appellees previously cited this same article to its author, (then) Judge Cassell, who disagreed with their interpretation, ruling that the Jensens' § 14 claim is independently cognizable. *See* Reply Add.Exh. 1 at 38-41.[10]

Apart from the foregoing, the Jensens argued alternatively in their opening brief that, even if issue or claim preclusion might otherwise apply, policy considerations would not support its application here. That argument is particularly compelling in the unique procedural posture of this case: (1) Fully briefed state constitutional claims, (2) involving fundamental rights, (3) originally brought in state court and included in the case from its inception, (4) have already been ruled by the federal court to be separately cognizable from the federal claims, and (5) the federal court went out of its way not simply to decline jurisdiction, but to emphasize that it was doing so because the Jensens' "Utah constitutional claims present important questions of state law[.]" If ever a case called for the non-application of *res judicata*, this is it.

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[10] The DCFS Defendants do not mention the reasoning behind Prof. Cassell's argument in the article, which was that the polygamy prosecutions would not have affected the Framers' general attitudes toward crime. Such rationale – that Utah's Framers would not have been pro-criminal – obviously would not apply to innocent parents and children.

Wagner/Albritton argue that issue preclusion would "prevent[] inconsistent outcomes based on the same events," and the federal court has reviewed the evidence "and found nothing to indicate that the doctors violated the Jensens' rights." But that argument only has force if the "rights" are identical under the state and federal constitutions; otherwise, there is nothing inconsistent about allowing the Jensens to recover for violations of one and not the other[11].

II. APPELLEES HAVE NOT ESTABLISHED AN ALTERNATIVE BASIS FOR AFFIRMANCE UNDER *SPACKMAN*.

Appellees seek affirmance on the alternate ground that plaintiffs have not met the requirements for a damages claim under the state constitution outlined in *Spackman v. Bd. Of Ed. Of Box Elder County Sch. Dist.*, 2000 UT 87, 16 P.3d 533. (In federal court, Judge Cassell ruled that, for three of the four state constitutional claims, *Spackman* is satisfied (*see* Reply Add.Exh. 1, pp. 28-31). The defendants did not appeal that ruling, or Judge Cassell's ruling that Art. I, §§ 1, 7, and 14 are self-executing.)

Under *Spackman*, a plaintiff seeking damages for violation of the state constitution must prove that (1) the constitutional violation was "flagrant"; (2) that "existing remedies" do not redress his injuries; and 3) that equitable relief is inadequate to protect the plaintiff's rights or redress his or her injuries.

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[11] Wagner/Albritton also suggest that the Jensens' claims are barred by the juvenile court action. (Wagner/Albritton Brief at 42.) They say that "comparative fitness" was "litigated before the juvenile court," but provide no support for, or analysis of, that contention. If Wagner/Albritton mean to suggest that the juvenile court proceeding somehow has *res judicata* effect, that legal argument was rejected by Judge Cassell, *see* Reply Add.Exh. 1, pp. 31-33.

A. Flagrancy of Constitutional Violations of Article I, §§ 1 & 7.

> In essence, [flagrancy] means that a defendant must have violated "clearly established" constitutional rights "of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). To be considered clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 639-40, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (citations omitted).

Spackman, supra at ¶ 23.

Wagner and Albritton imply that Judge Stewart found that the law was not clearly established, Wagner/Albritton Brief at 65, but as they acknowledge elsewhere, "the court did not reach the qualified immunity question as to whether the violated right was clearly established." *Id.* at 54. In fact, both Judge Stewart and Judge Cassell recognized that the alleged constitutional rights are clearly established, under both federal and state law. *See, e.g.,* Reply Add.Exh. 1 at 30 ("The alleged violations of these sections appear to be "flagrant"); 37 ("There is no compelling state interest in falsifying or misrepresenting evidence to a juvenile court."), and 42 ("multiple factual misrepresentations...omission[s] or falsehoods would undoubtedly affect the fairness of the proceedings."); *see also* Brief of Appellants Add.Exh. 3 at 32 ("...the Jensens' right to direct P.J.'s medical care ...is not only fundamental, but is also clearly established").

It has long been established that Article I, §§ 1 and 7 of the Utah Constitution guarantee both procedural and substantive due process rights, including the fundamental rights attendant in the parent-child relationship. *Wells v. Children's Aid Soc. of Utah*, 681 P.2d 199, 204 (Utah 1984); *In re J.P.*, 648 P.2d 1364 (Utah 1982) (Art. I § 7 recognizes

and protect "the inherent and retained right of a parent to maintain parental ties to his or her child"); *Block v. Schwartz*, 27 Utah 387, 76 P. 22, 24 (1904) (defining right of "liberty" encompassed in Art. I § 1 as "a term of comprehensive scope[] ... embrac[ing] not only freedom from servitude and from imprisonment and arbitrary restraint of person, but also all our religious, civil, political, and personal rights").)

The requirement that a DCFS caseworker do at least *some* investigation of neglect allegations – statutorily recognized as a component of due process – was likewise clear in 2003. Utah Code Ann. § 62A-4a-409(1) & (2) (2003); § 62A-4a-202.3(2)(a)-(g) (2003). DCFS' primary purpose is to protect children from abuse and neglect, Utah Code Ann. § 62A-4a-201(2), but it can only do so by using "the least intrusive means available," § 62A-4a-201(3), and in undertaking those least intrusive means, it must protect Utah parents' "fundamental right and duty to exercise primary control over the care, supervision, upbringing, and education of their children." § 62A-4a-201(1)(b) (2003).[12]

Appellees do not dispute that these rights are fundamental; hence, governmental actors have long been on notice that interference with the parent-child relationship is presumptively unconstitutional unless they can prove that their actions were "narrowly tailored" to serve a "compelling state interest." *Wells*, 681 P.2d at 206-07. It goes

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[12] While the federal court held that the claimed "emergency" barred a federal constitutional claim (even though Cunningham said she never investigated *any* medical neglect reports), this excuse would not bar a state constitutional violation, as evidenced by the Framers' unique and intense concerns about forced separation of the family, which appellees have not refuted. *E.g.,* Brief of Appellants, pp. 54-55. Moreover, even in an emergency, Cunningham was still required to "meet with the parents, attempt to negotiate voluntary compliance with medical treatment pending or in lieu of court involvement, and assess and document the parents' reasons for refusal to treat." (R. 3431.)

without saying that the State has a compelling state interest in protecting the health and well-being of children. *See In re J.P., supra.* However, it also goes without saying that there can never be a compelling state interest in falsifying or misrepresenting evidence, of which there is evidence that all defendants did, or reporting parents to DCFS for seeking reasonable diagnostic testing. *See, e.g.*, Reply Add.Exh.1, p. 37. Nor can such misconduct be considered narrowly tailored.

The Jensens' entitlement to a procedurally sound involvement with DCFS and the juvenile court is also clearly established under Art. I, § 7. *Wells, supra* at 204 (§ 7 guarantees "notice and opportunity to be heard, which must be observed in order to have a valid proceeding affecting life, liberty, or property." "The general test for the validity of such rules, the test of procedural due process, is fairness.") (citations omitted). It cannot be argued that making material misrepresentations and omissions affords a fair process. *See also* Brief of Appellants, p. 50 and Reply Add. Exh. 1 at 42.

B. Existing Remedies / Equitable Relief.

The appellees do not argue that any federal remedies exist that would be adequate, or (as they argued in the trial court) that sufficient remedies are available through the Jensens' state common law claims. Appellees argue, however, that the Jensens could have appealed from the juvenile court. Appealed what? The final order of dismissal in their favor? The July 10 stipulation allowing them to seek independent testing, upon which the Jensens were relying? The July 28 oral ruling, for which minutes were not even available until August 11, after custody had already been transferred?

In any event, Wagner and Albritton's argument misapprehends the Jensens' claims, which do not seek reversal of the interlocutory or final juvenile court order, but rather damages for the defendants' constitutional violations. Utah juvenile courts are courts of limited jurisdiction whose "powers are limited to those specifically conferred by the statute." *In re B.B.*, 2004 UT 39, ¶ 19, 94 P.3d 252. None of its codified areas of jurisdiction would have allowed the juvenile court to entertain civil claims for money damages based upon violations of state and federal constitutional rights or state common law. *See* Utah Code Ann. § 78-3a-104 (2003)(setting forth jurisdiction of juvenile court).

Wagner/Albritton argue that "the Jensens have failed to establish that equitable relief – such as an injunction, restraining order, or a motion to dismiss the removal proceeding – was wholly inadequate to protect their alleged right to direct Parker's medical care regardless of Parker's best interest." (Wagner/Albritton Brief at 68.) Ignoring the final clause (the Jensens wish that the appellees would show the courtesy of at least *acknowledging* the Jensens' actual argument), the appellees do not explain how one of those methods would have compelled them to stop making misrepresentations, or reimbursed Daren Jensen for his lost wages, or paid the Jensens' legal bills, or removed the handcuffs from Daren's wrists.

The violation of constitutional rights cannot always be effectively remedied by injunctive relief. *See Spackman*, 2000 UT 87, ¶ 25. *id.*, citing *Bott* ("if prisoners' rights under article I, section 9 are violated, injunctive relief may not be adequate to remedy prisoners' injuries") *citing Davis v. Passman*, 442 U.S. 228 (1979), and *Rockhouse*

Mountain Property Owners Ass'n, Inc. v. Town of Conway, 503 A.2d 1385, 1388 (N.H. 1986). In this case, there is no equitable relief that would make the Jensens whole.

III. APPELLEES HAVE NOT ESTABLISHED ANY OTHER ALTERNATIVE GROUNDS FOR AFFIRMANCE OF THE JUDGMENT.

The appellees briefly argue that, if the judgment cannot be sustained on *res judicata*, the Court should affirm on alternative grounds. It must be kept in mind that these arguments, by definition, hinge upon a review of the record, not the federal court's ruling. (Otherwise, the appellees would essentially be arguing, "If *res judicata* does not apply, please rule for us on these alternative grounds using *res judicata*.")

A. Governmental immunity.

The appellees first assert the alternative grounds of governmental immunity, another affirmative defense. Initially, appellees have not made a showing that governmental immunity would even apply to claims based upon self-executing state constitutional provisions. *See, e.g., Heughs Land, L.L.C. v. Holladay City*, 2005 UT App 202, ¶¶ 8-9, 113 P.3d 1024, and cases cited (governmental immunity is not a defense to claims under self-executing provision; "legislative power itself must be exercised within the framework of the constitution. Accordingly, it has been so long established and universally recognized, as to be hardly necessary to state, that if a statutory enactment contravenes any provision of the constitution, the latter governs") (citations omitted).)

Second, appellees base this contention on an assertion that "[t]he federal court ruled that Dr. Wagner did not act with fraud or malice and did not lie under oath." (Wagner/Albritton Brief at 64.) (Actually, the federal court did not say that. The

appellees made no argument regarding governmental immunity to Judge Stewart.) In any event, if *res judicata* does not apply – hence the request for affirmance on an alternative ground – then it is obviously improper for appellees to rely on a *res judicata*-dependent argument as the sole support for this defense.

If the Court entertains this alternative ground, its resolution requires review of the record – not only the additional cites offered by Wagner/Albritton, of course, but also the Jensens' conflicting citations, from which a jury could find that each of the appellees committed fraud and/or perjury. Moreover, that the defendants acted with malice may be inferred from their statements and from the very fact that they recklessly or intentionally made material misrepresentations. *See, e.g., Potter v. Utah Driv-Ur-Self Sys.*, 11 Utah 2d 133, 135, 355 P.2d 714 (1960) (malice may be implied from the wrongful act of filing a criminal complaint without reasonable justification for doing so).

B. Judicial immunity.

Eisenman seeks affirmance on the alternative ground that she is absolutely immunity for all of her actions in this case. In support of this contention, Eisenman relies primarily on statements by the federal court, which is obviously inappropriate when affirmance is sought on grounds not dependent upon *res judicata*.

Eisenman has not established the absence of a question of fact on this affirmative defense. Utah recognizes judicial immunity for judicial officers and those individuals who perform "functions closely related to the judicial process." *Sanders v. Leavitt*, 2001 UT 78, ¶ 19, 37 P.3d 1052. "Whether a person or entity should be afforded judicial immunity depends upon the specific work or function performed," *Bailey v. Utah State*

Bar, 846 P.2d 1278, 1280 (Utah 1993), which is a fact-specific inquiry. Although judicial immunity extends to acts closely related to the judicial process, it does not extend to administrative or investigatory functions, *Cline v. State Div. of Child and Family Services*, 2005 UT App 498, ¶ 40, 142 P.3d 127, or to wrongful misrepresentations and material factual omissions, *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993). A fact issue exists as to each of these issues.[13]

CONCLUSION

For the reasons set for above and in the Jensens' opening brief, the Jensens respectfully request the Court reverse the trial court's judgment.

RESPECTFULLY SUBMITTED this 10th day of February, 2010.

CHRISTENSEN & JENSEN, P.C.

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[13] Eisenman says that the Jensens' brief did not make any arguments regarding her (and therefore, apparently, cannot respond to her request for affirmance on an alternate ground.) *See* DCFS Defendants' Brief at 69. This argument is perplexing. The trial court's erroneous application of *res judicata* was the sole basis for dismissing all defendants. Accordingly, a reversal of that ruling necessarily includes Eisenman. The Jensens also specifically delineated each of Eisenman's alleged misrepresentations and other challenged actions, and then articulated for each section of the state constitution which type(s) of conduct they believed violated that provision. In any event, appellants are not required to anticipate in their opening briefs arguments for affirmance on alternate grounds that a defendant might choose to make; appellants are entitled to argue, as the Jensens did, that the trial court's actual ruling is erroneous.

CERTIFICATE OF SERVICE

This is to certify that on the 10th day of February, 2010, two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANTS** were mailed, first-class postage prepaid, to:

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Addendum
Exhibit 1

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

P.J., a minor, by and through his parents and natural guardians, BARBARA and DAREN JENSEN; BARBARA JENSEN, individually; and DAREN JENSEN, individually, Plaintiffs, vs. STATE OF UTAH; INTERMOUNTAIN HEALTH CARE, INC.; KARI CUNNINGHAM, in her individual capacity; RICHARD ANDERSON, in his individual and official capacities; LARS M. WAGNER, in his individual capacity; DAVID L. CORWIN, in his individual capacity; CHERYL M. COFFIN, in her individual capacity; KAREN H. ALBRITTON, in her individual capacity; SUSAN EISENMAN, in her individual capacity; and JANE AND JOHN DOE, in their individual capacities, Defendants.	ORDER ON MOTIONS TO DISMISS Case No. 2:05CV00739 PGC

A months-long ordeal between plaintiffs Daren and Barbara Jensen and the State of Utah over medical care for P.J., the Jensens' minor son, began in 2003 when doctors at Primary Children's Medical Center diagnosed P.J. with Ewing's sarcoma. The Jensens asked for confirmatory tests, which were not immediately performed. The disputed diagnosis triggered an

neglect investigation by the State's Division of Child and Family Services because the Jensens refused to require P.J. to submit to chemotherapy. It also led to a juvenile court proceeding in which the Jensens lost legal custody of P.J. to the State. The case garnered widespread media interest, bringing the Jensens unwanted notoriety. Mr. and Mrs. Jensen eventually were indicted for kidnapping their own son.

After months of wrangling, DCFS decided it could not force P.J. to submit to chemotherapy without parental support and moved the juvenile court to dismiss the case. The Salt Lake District Attorney's Office also dismissed the kidnapping charges against the Jensens in exchange for their plea in abeyance to a lesser misdemeanor charge of custodial interference.

The Jensens then filed this civil rights action, seeking damages for alleged violations of the United States and Utah Constitutions, for wrongful initiation of criminal charges, and for intentional infliction of emotional distress. The crux of the Jensens' allegations is that DCFS employees, doctors, and attorneys in the Utah Attorney General's office maliciously mislead Utah courts in their efforts to force P.J. to submit to chemotherapy. They also allege that the juvenile court proceeds were conducted unfairly due to numerous misrepresentations and that the defendants' conduct led to unwarranted criminal proceedings against Mr. and Mrs. Jensen.

Before the court are motions by the Jensens to certify a question to the Utah Supreme Court and by the defendants to dismiss the Jensens' claims. The court denies the Jensens' motion to certify; at this early stage, the court cannot confidently conclude that all the requirements in Rule 41 of the Utah Rules of Appellate Procedure are met. With respect to the motion to dismiss, the court is required to assume the truth of the Jensens' allegations.

Proceeding on the basis, and as more fully discussed below, the court grants the defendants' motion in these particulars: (1) all claims against the State of Utah fail because of sovereign immunity; (2) the Jensens' fourth and eighth causes of action fail to state a claim and must be dismissed as against all defendants; (3) the Jensens fail to state a claim against Richard Anderson in his official capacity; (4) plaintiff P.J. fails to state a claim for malicious prosecution or for denial of a Fourteenth Amendment liberty interest in refusing medical care; and (5) all claims against Dr. Corwin and Dr. Coffin are dismissed because these two doctors are entitled to absolute immunity. The court denies the defendants' motions in all other respects.

I. Rule 12(b)(6) Standard

Defendants have moved for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The court may grant a Rule 12(b)(6) motion "only if it appears beyond a doubt that the plaintiff[s] [are] unable to prove *any* set of facts entitling [them] to relief under [their] theory of recovery."[1] The court does not determine whether defendants actually did what the plaintiffs say they did — the law *requires* the court to "'accept as true all well-pleaded facts, as distinguished from conclusory allegations,'" in the Jensens' complaint.[2] The court also "must view all reasonable inferences in favor of the plaintiff, and the pleadings must be liberally construed" in the plaintiffs' favor.[3]

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[1]*Ruiz v. McDonnell*, 299 F.3d 1173, 1181 (10th Cir. 2002) (emphasis added).

[2]*Beedle v. Wilson*, 422 F.3d 1059, 1063 (10th Cir. 2005) (quoting *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1304 (10th Cir. 1998)).

[3]*Ruiz*, 299 F.3d at 1181.

These legal rules do *not* mean that if a court denies the motions to dismiss and thereby allows the lawsuit to continue that the defendants are automatically liable and that the plaintiffs will certainly win. "The issue in reviewing the sufficiency of the complaint is not whether the plaintiff[s] will prevail, but whether the plaintiff[s] [are] entitled to offer evidence to support [their] claims."[4] Thus, when resolving this type of motion, the court's job is essentially to ask: If everything the plaintiffs allege is true, do those allegations establish an injury that the law redresses? If the answer is yes, the case continues, allowing the plaintiffs to gather evidence that *proves* to a jury, beyond a preponderance of the evidence, that the allegations in their complaint are true.

II. The State of Utah's Motion to Dismiss

The Jensens named the State of Utah as a defendant in their fifth through tenth causes of action. Plaintiffs' fifth, sixth, seventh, and eighth claims seek damages for violations of various provisions of the Utah Constitution. Their ninth and tenth claims seek tort damages. For the reasons explained more fully below, the court GRANTS the State's motion to dismiss these claims.

A. Violations of the Utah Constitution

The State argues that sovereign immunity bars the Jensens' Utah constitutional claims against it. The court agrees.

In *Spackman ex rel. Spackman v. Board of Education*, the Utah Supreme Court said that, except for one provision not applicable here, "the Utah Constitution does not expressly provide

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[4] *Id.*

damages remedies for constitutional violations."[5] Similarly, under Utah law, "there is no express statutory right to damages for one who suffers a constitutional tort."[6] Accordingly, "a Utah court's ability to award damages for [a] violation of a self-executing constitutional provision rests on the common law."[7]

At common law, the State was immune from suit. The Utah Supreme Court has said that "[s]overeign immunity was as a settled feature of the common law when Utah became a state and adopted its constitution."[8] The Utah Supreme Court defined the common law doctrine of sovereign immunity in these terms: "'[I]n the absence of either express constitutional or statutory authority an action against a sovereign state cannot be maintained. The doctrine is elementary and of universal application, and so far as we are aware there is not a single authority to the contrary.'"[9]

In this case, the Jensens have not pointed to "express constitutional or statutory authority" that waives Utah's sovereign immunity and permits claims against the State for violations of the specific Utah constitutional provisions cited in their complaint. The State's common law sovereign immunity thus bars the Jensens' constitutional claims against it.

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[5]16 P.3d 533, 537 (Utah 2000).

[6]*Id.*

[7]*Id.* at 538.

[8]*Tiede v. State*, 915 P.2d 500, 504 (Utah 1996).

[9]*Id.* (quoting *Wilkinson v. State*, 134 P. 626, 630 (Utah 1913)).

B. Tort Claims

Though the State has retained sovereign immunity for constitutional violations, the Utah Legislature has waived the State's immunity for certain tort claims. The Utah Governmental Immunity Act allows claims against the State "for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment."[10] The UGIA, however, waives immunity only for negligent, not for intentional, torts. The limits of this waiver are fatal to the Jensens' two tort causes of action — intentional infliction of emotional distress and wrongful initiation of process — because both are intentional torts.[11] As such, the UGIA does not waive the State's immunity for these two causes of action.

And even if these two causes of action could be classified as stemming from a State actor's negligence, the UGIA reinstates sovereign immunity in the circumstances alleged here. If a plaintiff's injury is "proximately caused by a negligent act . . . of an employee" but "arises out of, in connection with, or results from: . . . malicious prosecution, . . . abuse of process, . . . [or] infliction of mental anguish," that injury cannot form the basis for state liability.[12] Since the Jensens' two tort causes of action arise out of malicious prosecution, abuse of process, and infliction of mental anguish, the UGIA bars these claims against the State.

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[10]*See* Utah Code Ann. § 63-30-10 (2003).

[11]*See Prince v. Bear River Mut. Ins. Co.*, 56 P.3d 524, 535 (Utah 2002) (intentional infliction of emotional distress); *Brown's Shoe Fit Co. v. Olch*, 955 P.2d 357, 367 n.12 (Utah Ct. App. 1998) (wrongful initiation of proceedings).

[12]*See* Utah Code Ann. § 63-30-10(2).

In sum, the court grants the State's motion and dismisses under Rule 12(b)(6) all of the Jensens' claims against it. The State has not waived sovereign immunity for its employees' intentional torts or their violations of the Utah Constitution.

III. State Employees' Motion to Dismiss

Defendants Richard Anderson, Susan Eisenman, and Kari Cunningham were all employees of the State of Utah when the events relevant to this lawsuit occurred. Mr. Anderson was DCFS's director. Ms. Eisenman was an assistant attorney general in the State's Attorney General's Office. Ms. Cunningham was a DCFS social worker. The court will address each argument these three defendants make in their motion, beginning with arguments applicable only to Anderson and Eisenman and then discussing arguments common to all three.

A. Defendant Richard Anderson

The Jensens sued Mr. Anderson in both his official and individual capacities. He argues that the court should dismiss the individual capacity claims because the Jensens have failed to plead a causal link between his conduct and any constitutional violations as § 1983 requires. He also argues that the official capacity claims should be dismissed because, in his official capacity, he is not a "person" for purposes of § 1983. The court holds that the individual capacity claims should not be dismissed but that the official capacity claims should be.

1. Individual Capacity

Mr. Anderson argues that the Jensens' § 1983 claims against him in his individual capacity should be dismissed because the Jensens failed to allege an "affirmative link" between his conduct and any constitutional violation. Mr. Anderson is correct that the Jensens may not

hold him liable merely because DCFS employees he supervises may have violated the Jensens' constitutional rights: "under § 1983, 'a defendant may not be held liable under a theory of respondeat superior.'"[13] "Instead, '[the Jensens] must show that an affirmative link exists between the [constitutional] deprivation and either [Mr. Anderson's] personal participation, his exercise of control or discretion, or his failure to supervise.'"[14]

The complaint sufficiently Mr. Anderson's personal involvement in this case by alleging that he flew to Idaho on September 15, 2003, to negotiate with the Jensens and that he supported a September 5 stipulation between the Jensens and DCFS to have P.J. evaluated by an Idaho physician. The Jensens also allege that while in Idaho, Mr. Anderson said to Mr. Jensen, "We can tell that you're not a neglectful parent, but we just can't let you go."[15]

As noted above, Rule 12(b)(6) requires the court to accept these factual allegations as true.[16] The court also "must view all reasonable inferences in favor of the plaintiff, and the pleadings must be liberally construed."[17] The court may grant Mr. Anderson's motion "only if it appears *beyond a doubt* that" the Jensens are "unable to prove *any* set of facts entitling [them] to relief under [their] theory of recovery."[18] These legal standards compel the court to deny Mr.

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[13]*Ledbetter v. City of Topeka*, 318 F.3d 1183, 1187 (10th Cir. 2003) (quoting *Worrell v. Henry*, 219 F.3d 1197, 1214 (10th Cir. 2000)).

[14]*Id.* (citing *Worrell*, 219 F.3d at 1214).

[15]Compl. ¶ 157.

[16]*Ruiz*, 299 F.3d at 1181.

[17]*Id.*

[18]*Id.* (emphases added).

Anderson's motion to dismiss. The Jensens' complaint adequately alleges an affirmative link "between the [constitutional] deprivation and either . . . [Mr. Anderson's] exercise of control or discretion[] or his failure to supervise.'"[19] The complaint alleges that Mr. Anderson's office had intensive, day-to-day involvement in the Jensens' case during 2003. A reasonable inference from the entire complaint — not just from the allegations that specifically mention Mr. Anderson — is that Mr. Anderson, as DCFS's director, personally participated in, exercised control or discretion over, or failed to supervise his employees' actions in the Jensens' case.

Of course, allowing the claims against Mr. Anderson in his individual capacity to proceed does not mean that the Jensens will prevail. The Jensens have much more to prove before their claims against Mr. Anderson in his individual capacity could survive summary judgment, for at the summary judgment stage, unlike here, the issue is in fact "whether the plaintiff[s] will prevail," not just whether they have *alleged* that they will.[20] At this stage, however, the Jensens may proceed with their claims.

2. Official Capacity

Mr. Anderson also seeks dismissal of all claims against him in his official capacity. His motion is based on the Tenth Circuit's holding that "[n]either the state, nor a governmental entity that is an arm of the state for Eleventh Amendment purposes, *nor a state official who acts in his or her official capacity*, is a 'person' within the meaning of § 1983."[21] In addition to this Tenth

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[19] *Id.* (citing *Worrell*, 219 F.3d at 1214).

[20] *Id.*

[21] *Harris v. Champion*, 51 F.3d 901, 905–06 (10th Cir. 1995) (emphasis added).

Circuit holding, the Supreme Court has held that "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself."[22]

The Jensens concede that their § 1983 claims against Mr. Anderson in his official capacity should be dismissed based on *Harris v. Champion*.[23] They contend, however, that the remainder of their claims against Mr. Anderson (state constitutional violations and tort claims) "are cognizable in both capacities."[24] This position fails to account for the Supreme Court's holding in *Will v. Michican Department of State Police* that claims against a state officer such as Mr. Anderson in his official capacity — regardless of the type of claim — are "no different" than claims against the State itself.[25] The court therefore holds that the Jensens' tort and state constitutional claims against Mr. Anderson in his official capacity fail for the same reasons those claims fail as against the State of Utah.

The Jensens fail to state a claim against Mr. Anderson in his official capacity upon which relief may be granted. The court therefore dismisses all such claims against him.

B. Susan Eisenman

Ms. Eisenman, sued in her individual capacity only, argues that she is entitled to absolute prosecutorial immunity from all the Jensens' claims. Absolute prosecutorial immunity extends

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[22]*Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70–71 (1989) (citation omitted).

[23]Pls.' Mem. in Opp'n to Mot. to Dismiss of Defs. Cunningham and Eisenman (Docket No. 36), *Jensen v. Utah*, Case No. 2:05-CV-739 PGC (D. Utah filed Jan. 17, 2006).

[24]Docket No. 36, at 10.

[25]491 U.S. at 70–71.

to prosecutors when they "perform[] the traditional functions of an advocate."[26] But immunity does not extend to "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate.'"[27] For example, in *Kalina v. Fletcher*, the Supreme Court held that a prosecutor was not entitled to absolute immunity when she provided affidavit testimony in support of a criminal information and arrest warrant.[28] The Court said that immunity did not attach because the prosecutor "performed an act that any competent witness may have performed."[29] Thus, whether Ms. Eisenman is entitled to absolute immunity depends on whether the complaint alleges that her actions were prosecutorial or investigatory.

The Jensens' memorandum in opposition to the motion to dismiss identifies three specific instances of investigatory conduct alleged in their complaint. First, they allege that Ms. Eisenman contacted Dr. Jeorg Birkmayer, an Austrian physician whom the Jensens had contacted to treat their son. Paragraph 104 of their complaint alleges that Ms. Eisenman e-mailed Dr. Birkmayer and asked, "As I am sure you are aware, the American Academy of Pediatrics has established a standard of care for pediatric cancer patients. Is there a similar standard of care for patients in Australia?" Second, the Jensens allege that Ms. Eisenman was a complaining witness in the juvenile court. Citing paragraphs 127 and 150 of their complaint, the Jensens claim that

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[26]*Kalina v. Fletcher*, 522 U.S. 118, 131 (1997).

[27]*Id.* at 125 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430–31 (1976)).

[28]*See id.* at 128–30.

[29]*Id.* at 129–30.

Ms. Eisenman made specific factual misrepresentations to the juvenile court regarding their alleged disobedience to the court's orders and their son's chance of survival without chemotherapy. Third, the Jensens allege in paragraphs 141 through 143 of their complaint that Ms. Eisenman was a complaining witness when she went to Salt Lake County and provided information that led to kidnapping charges against Mr. and Mrs. Jensen.

In response to the Jensens' allegations that she was a complaining witness, Ms. Eisenman claims that she made all her statements to the juvenile court in her role as an advocate and not as a complaining witness. Her counsel also states that:

> To the extent any residual claims remain concerning the criminal [kidnapping] case against Barbara Jensen or Daren Jensen, without allegations that Ms. Eisenman was the affiant in support of their arrest warrant, a complaining witness referenced therein, or a prosecuting attorney, there is simply no affirmative link between her actions and any constitutional violation. Moreover, Plaintiffs could not make those allegations because Ms. Eisenman was not the affiant *and is not to be found anywhere* in either the *Information* or the *Probable Cause Statement* for Barbara Jensen or for Daren Jensen (attached as Exhibits 1 and 2).[30]

The court reviewed Exhibits 1 and 2, the criminal informations charging Mr. and Mrs. Jensen with kidnapping. This statement appears on the second page of each exhibit: "THIS INFORMATION IS BASED ON EVIDENCE OBTAINED FROM THE FOLLOWING WITNESSES: T. Peterson, K. Cunningham, M. McDonald, *S. Eisenman*, P.J., and B. Nakamura."[31]

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[30]Docket No. 46, at 9–10 (emphasis added).

[31]*See id.* Ex. 1 & 2, at 2 (emphasis added).

Her counsel conceded at oral argument that "S. Eisenman" was defendant Susan Eisenman but disputed the nature and extent of her involvement. Yet the question remains: did Susan Eisenman provide factual information to the District Attorney's office that led to criminal charges against Mr. and Mrs. Jensen? These exhibits create a question of fact about whether she did. Since the court must view all inferences in the Jensens' favor, these exhibits are sufficient to defeat Ms. Eisenman's claim to absolute prosecutorial immunity at this time. The plaintiffs, however, may proceed only as to the limited matters allegedly performed outside Eisenman's prosecutorial capacity. The court understands that such subjects would be relatively narrow.

C. P.J.'s Individual Claims

The State employees next claim that P.J. lacks standing to bring his § 1983 claims because he cannot show "an invasion of a legally protected interest."[32] The Supreme Court has made clear that this requirement is a necessary predicate for Article III jurisdiction to exist.[33] But recent Tenth Circuit authority shows that defendants' arguments confuse standing with the merits of P.J.'s claims. The court will discuss this authority before addressing the employees' arguments.

In *Initiative & Referendum Institute v. Walker*, the Tenth Circuit addressed a First Amendment challenge to a Utah Constitution amendment governing wildlife initiatives.[34] The defendants argued that the plaintiffs had no standing to challenge the amendment. The circuit

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[32]*Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 663–64 (1993).

[33]*See id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

[34]No. 02-4105, 2006 WL 1377028, at *1 (10th Cir. May 17, 2006).

rejected that argument, stating that "[f]or purposes of standing, the question cannot be whether the Constitution, properly interpreted, extends protection to the plaintiff's asserted right or interest. If that were the test, every losing claim would be dismissed for want of standing."[35] Thus, "where the plaintiff presents a nonfrivolous legal challenge, alleging an injury to a protected right such as free speech, the federal courts may not dismiss for lack of standing on the theory that the underlying interest is not legally protected."[36]

Here, P.J. alleges injuries to rights he claims are protected by the Fourteenth Amendment. The State employees' motion to dismiss turns on whether "the Constitution, properly interpreted, extends protection to [P.J.'s] asserted right or interest." If the court dismisses P.J.'s claims, it is because the Constitution does *not* protect the rights P.J. asserts — a quintessential merits question. *Walker* thus prohibits the court from dismissing P.J.'s claims for lack of standing. Instead, the court will construe the motion as one to dismiss for failure to state a claim.

1. Does P.J. Have a Substantive Due Process Right to Refuse Medical Treatment?

The State employees attack P.J.'s first cause of action, labeled "Liberty interest / Due Process," which alleges that P.J. "had a clearly established fundamental right and liberty interest under the Due Process Clause of the Fourteenth Amendment to the United States Constitution to

[35] *Id.* at *8.

[36] *Id.* at *9.

refuse unwanted medical treatment."[37] They argue that "P.J. could not refuse to consent to medical treatment; he consequently lacked a liberty interest in directing his own medical care."[38]

This is a troubling proposition. Taken to its logical conclusion, accepting the defendants' argument would mean that *all* children, by virtue of their minority, would be incapable of refusing to consent to medical care and therefore would *never*, under any circumstances, have a constitutionally protected interest in refusing medical treatment. This would be a broad conclusion indeed.

The defendants do not cite any case that holds that minors lack a Fourteenth Amendment right to refuse medical treatment. On the other hand, the cases the Jensens cite strongly imply (but do not hold) that a minor may have a liberty interest to refuse medical treatment. For instance, the Jensens cite *Parham v. J.R.*, where Supreme Court held that a mentally challenged minor child had a liberty interest in "not being confined unnecessarily for medical treatment."[39] A later case, however, clarified that *Parham* "certainly did not intimate that such a minor child, after commitment, would have a liberty interest in refusing treatment."[40] Ultimately, *Parham* is not dispositive because it discussed liberty interests of minor children with mental health problems and was limited to unnecessary confinement, not unwanted treatment. Here, plaintiff

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[37]Compl. ¶ 189.

[38]Doc. 24, at 7.

[39]442 U.S. 584, 600 (1979).

[40]*Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 279 (1990).

P.J. does not have a diagnosed mental illness and he refused treatment rather than institutionalization.

P.J. also cites *Cruzan v. Missouri Department of Health*. In *Cruzan*, the Supreme Court said that "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions."[41] The Court, citing *Parham*, also that "[s]till other cases support the recognition of a general liberty interest in refusing medical treatment."[42] And later in its decision, the Court said, "[i]t cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment."[43] Again, these cases — while instructive — are not dispositive because, with the exception of *Parham*, all involved adults rather than minors.

The Jensens also cite Tenth Circuit precedent to show that P.J. has a liberty interest to refuse unwanted medical care. In *Dubbs v. Head Start, Inc.*, parents brought § 1983 claims for physical examinations of their children that allegedly violated the children's "right to refuse medical treatment."[44] While the Tenth Circuit said that "[i]t is not implausible to think that the right[] invoked here — the right to refuse a medical exam . . . — fall[s] within this sphere of protected liberty,"[45] it declined to resolve the issue and instead relied on the children's Fourth

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[41]497 U.S. at 278.

[42]*Id.*

[43]*Id.* at 281.

[44]336 F.3d 1194, 1202 (10th Cir. 2003).

[45]*Id.* at 1203.

Amendment rights to resolve their claims.[46] *Dubbs* is also inapposite because P.J., unlike the minors in *Dubbs*, was never searched or required to undergo treatment.

Based on these cases, the court holds that a child as young as P.J. did not have his own right to refuse medical treatment. Instead, that right belongs to his parents. In other words, P.J.'s claim is subsumed by his parents' claim, at least under clearly established law. The court therefore grants the motion to dismiss the Jensens' first cause of action as to P.J.

2. Familial Association

The State employee defendants next incorrectly claim that minor children have no Fourteenth Amendment liberty interest in familial association. In 1997, the Tenth Circuit decided *J.B. v. Washington County*.[47] The two plaintiffs in that case were a mother and her minor child who sued under § 1983 for alleged violations of their substantive due process right to familial association.[48] The Tenth Circuit said that "[p]laintiffs' right to familial association is included in the substantive due process right of freedom of intimate association, which is 'consonant with the right of privacy.'"[49] The court also said that "[u]ndeniably, plaintiffs have a substantial interest in the right to associate with their family."[50] The repeated use of the plural "plaintiffs," referring both to the mother *and* her minor daughter, shows that the right to familial

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[46]*See id.*

[47]127 F.3d 919 (10th Cir. 1997).

[48]*See id.* at 927.

[49]*Id.* (quoting *Griffin v. Strong*, 983 F.2d 1544, 1547 (10th Cir. 1993)).

[50]*Id.*

association did not belong to the mother only. On this basis, the court holds that minor children have liberty interests in familial association that are protected by the Fourteenth Amendment. Defendants' argument as to this point fails.

3. Malicious Prosecution

Finally, the defendants ask the court to dismiss P.J.'s third cause of action, labeled "Fourth Amendment / Malicious prosecution." The court holds that P.J. fails to state a malicious prosecution claim and therefore grants defendants' motion.

In *Taylor v. Meacham*, the Tenth Circuit said that it "takes the common law elements of malicious prosecution as the 'starting point' for the analysis of a § 1983 malicious prosecution claim, but always reaches the ultimate question, which it must, of whether the plaintiff has proven a *constitutional* violation."[51] "[I]n the § 1983 malicious prosecution context, that constitutional right is the Fourth Amendment's right to be free from unreasonable seizures."[52]

Here, P.J. fails to state a claim for malicious prosecution because his allegations do not establish each of that claim's four common law elements, which are : "(1) A criminal proceeding instituted or continued by the defendant against the plaintiff; (2) termination of the proceeding in favor of the accused; (3) absence of probable cause for the proceeding; (4) 'malice,' or a primary purpose other than that of bringing an offender to justice."[53] Since P.J. does not allege that the defendants instituted criminal proceedings against him, this claim fails.

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[51]82 F.3d 1556, 1561 (10th Cir. 1996).

[52]*Id.*

[53]*Callioux v. Progressive Ins. Co.*, 745 P.2d 838, 843 (Utah Ct. App. 1987).

And even if the court were to construe this claim as alleging a denial of P.J.'s Fourth Amendment right to be free from unreasonable seizures — without malicious prosecution overtones — the claims still fails. Of the "seizures" alleged, those applicable to P.J. are: (1) he was unable to travel freely, and (2) he was required to be physically present in court or at other specified locations on numerous occasions.[54] Accepting these facts as true, these events do not implicate the Fourth Amendment. They are more properly addressed as violations of P.J.'s liberty interests, wrongs for which he seeks redress in his other causes of action.

D. The Jensens State a Claim for Deprivation of Familial Association Rights.

The State employee defendants next argue that the Jensens' familial association claim fails because the defendants' actions were not unduly burdensome or, alternatively, because the defendants are entitled to qualified immunity. The court disagrees with both assertions.

The Jensens' "familial right of association is properly based on concept of liberty in the Fourteenth Amendment."[55] The Tenth Circuit has held that "[t]o determine whether a person's familial association rights have been violated" requires "'a balancing [of] liberty interests against the relevant state interests.'"[56] The question when weighing these interests is whether the State's conduct "constituted an undue burden on" the plaintiffs' associational rights.[57] And "'[n]ot every statement or act that *results* in an interference with the rights of intimate association is

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[54]*See* Compl. ¶ 199.

[55]*Griffin v. Strong*, 983 F.2d 1544, 1547 (10th Cir. 1993).

[56]*Id.* (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982)).

[57]*Id.*

actionable.' The conduct or statement must be directed 'at the intimate relationship with knowledge that the statements or conduct will adversely affect that relationship.'"[58]

On one side of the scale in this balancing test is the Jensens' "right to associate with [their] family," which "is a very substantial right."[59] This right includes — but is not limited to — parents' right to direct their child's medical care. The Supreme Court has frequently "recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children,"[60] for "'[f]amily relationships by their nature, involve deep attachments and commitments to the necessary few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs, but also distinctly personal aspects of one's life.'"[61]

Opposite the Jensens' interests sits the State's "'traditional and transcendent interest' in protecting children from abuse and from situations where abuse might occur."[62] Precedent clearly shows that "the state itself has a compelling interest in the health, education and welfare of children."[63]

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[58]*J.B.*, 127 F.3d at 927 (quoting *Griffin*, 983 F.2d at 1548 (citation omitted)).

[59]*Griffin*, 983 F.2d at 1548.

[60]*Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion) (citing cases).

[61]*J.B.*, 127 F.3d at 927 (quoting *Arnold v. Bd. of Educ. of Escambia County*, 880 F.2d 305, 312–13 (11th Cir. 1989) (quotation marks and citation omitted)).

[62]*Griffin*, 983 F.2d at 1548 (quoting *Maryland v. Craig*, 497 U.S. 836, 855 (1990) (quotation marks and citation omitted)).

[63]*Martinez v. Mafchir*, 35 F.3d 1486, 1490 (10th Cir. 1994).

This case presents the somewhat unusual situation where the parents' firm opinions about what treatment was best for their son did not coincide with the State's recommendations. Accepting the complaint's allegations as true, the Jensens agreed with the State all along that P.J. might well have cancer but wanted to confirm that it was Ewing's before subjecting him to the rigorous chemotherapy required to treat that specific cancer. The Jensens allege that the State refused to perform certain genetic tests that would have confirmed P.J.'s diagnosis of Ewing's. They also accuse the State defendants of acting in concert to maliciously remove P.J. from his parents' care and force him — against his will and his parents' wishes — to begin chemotherapy. And the complaint alleges that in 2003, the State deliberately made specific misrepresentations in Utah courts that led to the transfer P.J.'s legal custody to the State, eliminated P.J.'s ability to receive care from doctors of his parents' choice, and led to Mr. Jensen's arrest and criminal charges against Mr. and Mrs. Jensen.

Despite the State's admittedly compelling interest in the health of its children, the court holds that, based on the complaint's allegations, the balancing tips in favor of the Jensens. Here, the parents' attempt to secure a reasonable confirmatory diagnosis was met first by stonewalling and then by misrepresentations to a court in order to secure the State's preferred treatment, all done with knowledge that the Jensens would be harmed. To be sure, these allegations are unproven. The court, however, must accept them as true, and on that basis holds that the familial association claim survives the defendants' motion to dismiss.

For similar reasons, qualified immunity does not shield the State employees from liability for allegedly violating the Jensens' familial association rights. "When evaluating a qualified

immunity defense, after identifying the constitutional right allegedly violated, courts must determine whether the conduct was objectively reasonable in light of clearly established law at the time it took place."[64] Here, as discussed, the constitutional right is the Fourteenth Amendment right to familial association and right to direct the care of one's children. These rights were clearly established when the relevant events occurred during 2003.[65] It was also clearly established in 2003 that the Jensens had the right not to be deprived of these liberty interests as a result of misrepresentations to state courts by government officials.[66] The state actions alleged in the complaint — intentional factual misrepresentations and omissions to the state courts — could not have been objectively reasonable in light of this clearly established law.[67] Because the court must accept the complaint's allegations as true, defendants are not entitled to qualified immunity for this claim at this early stage of the proceedings.

E. The Jensens State a Procedural Due Process Claim.

The employee defendants next argue that the Jensens cannot state a claim for procedural due process violations because the Fourteenth Amendment's guarantee provides for "'the opportunity to be heard at a meaningful time and in a meaningful manner.'"[68] The defendants

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[64]*Pierce v. Gilchrist*, 359 F.3d 1279, 1297 (10th Cir. 2004).

[65]*See Troxel*, 530 U.S. at 66 (plurality opinion) (citing cases); *see also J.B.*, 127 F.3d at 927.

[66]*Pierce*, 359 F.3d at 1297–99.

[67]*See id.*

[68]*Mathews v. Eldridge*, 424 U.S. 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 554 (1965)).

argue that since the Jensens were afforded ample opportunity to be heard in the state juvenile proceedings, the procedural due process claims must fail.

The defendants' reading of the Due Process Clause, though accurate, is incomplete. In addition to promising the right to be heard, "[t]he Due Process Clause also encompasses . . . a guarantee of *fair* procedure."[69] Thus, the Due Process Clause requires more than notice and a hearing — the notice and hearing must also be fair. The complaint contains allegations that the State employees and the doctors intentionally misrepresented or omitted facts in the Jensens' case, including the status of allegedly confirmatory tests, to the Utah juvenile court.[70] Thus, for purposes of this motion, the complaint adequately alleges a procedural due process violation.

F. Malicious Prosecution Claim

The State Defendants argue that, since the Jensens pleaded guilty to misdemeanor charges of custodial interference, they cannot state a claim for malicious prosecution. The defendants assert that the Jensens' plea precludes them from proving a "favorable termination," a required element of a malicious prosecution claim.[71]

At this early stage of the proceedings, the court finds the complaint pleads facts that could potentially support a finding that the Jensens' agreement to plead guilty was coerced through unfair means. In particular, the Jensens allege that felony charges were filed against them due to the defendants' intentional misrepresentations to the Salt Lake County District Attorney's Office.

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[69]*Zinermon v. Burch*, 494 U.S. 113, 125 (1990).

[70]*See, e.g.*, Compl. ¶ 127.

[71]*See Callioux v. Progressive Ins. Co.*, 745 P.2d 838, 843 (Utah Ct. App. 1987).

Since the felony charges carried mandatory jail time, defendants' actions ensured that the Jensens would have to plead guilty to a lesser misdemeanor offense to avoid that jail time. If these allegations are correct, the Jensens' plea would not preclude their malicious prosecution action.

G. Ninth Amendment Claim

The Jensens' fourth cause of action seeks damages under § 1983 for alleged violations of the Ninth Amendment. The defendants argue that this cause of action fails to state a claim upon which relief may be granted. The court agrees and dismisses this cause of action.

A number of courts have held that "the Ninth Amendment standing alone does not confer substantive rights for purposes of pursuing a constitutional claim. Specifically, section 1983 civil rights claims premised on the Ninth Amendment must fail because there are no constitutional rights secured by that amendment."[72] And the Tenth Circuit has never held that a § 1983 action can be maintained solely on the basis of a Ninth Amendment violation. To the extent plaintiffs seek to vindicate alleged violations of their constitutionally protected familial association rights, they may properly seek redress under § 1983 based on the Fourteenth Amendment.

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[72]*Nicolette v. Caruso*, 315 F. Supp. 2d 710, 718 (W.D. Pa. 2003) (citations and quotation marks omitted); *see also Strandberg v. City of Helena*, 791 F.2d 744 (9th Cir. 1986) (same); *Clynch v. Chapman*, 285 F. Supp. 2d 213 (D. Conn. 2003) (same); *Coleman v. Parra*, 163 F. Supp. 2d 876 (S.D. Ohio 2000) (same); *Basile v. Elizabethtown Area Sch. Dist.*, 61 F. Supp. 2d 392 (E.D. Pa. 1999) (same); *DeLeon v. Little*, 981 F. Supp. 728 (D. Conn. 1997) (same); *Williams v. Perry*, 960 F. Supp. 534 (D. Conn. 1996) (same); *Mann by Parent v. Meachem*, 929 F. Supp. 622 (N.D.N.Y. 1996) (same); *In re State Police Litigation*, 888 F. Supp. 1235 (D. Conn. 1995) (same); *Rini v. Zwirn*, 886 F. Supp. 270 (E.D.N.Y. 1995) (same); *Charles v. Brown*, 495 F. Supp. 862 (N.D. Ala. 1980) (same).

H. State Law Claims

As discussed above, the Jensens seek damages for alleged violations of the Utah Constitution and for state-law torts. The State employee defendants seek dismissal of both sets of claims. The court will first address the defendants' arguments regarding the Jensens' tort claims and then their arguments regarding the Jensens' Utah constitutional claims.

1. Tort Claims Against the State or State Actors

The Utah Governmental Immunity Act requires a claimant to file a notice of claim with the proper state agency before suing the State or its employees. The required contents of a notice of claim are set by statute,[73] and a proper notice of claim is a jurisdictional prerequisite to suit.[74] The State employee defendants argue that the court lacks jurisdiction over the Jensens' tort claims because their notice of claim fails to comply with the UGIA's provisions in two respects. First, the defendants argue that the notice of claim does not adequately state the nature of the claims asserted. Second, they argue that notice of claim fails to allege the individual defendants acted with fraud or malice. Both assertions are incorrect.

Utah Code Ann. § 63-30-11(3) states that a "notice of claim shall set forth: . . . the nature of the claim asserted."[75] Defendants argue that the Jensens' notice of claim sets forth only an infliction of emotional distress claim, so the remainder of their claims must be dismissed. In

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[73]*See* Utah Code Ann. § 63-30-11 (2003).

[74]*Peeples v. State*, 100 P.3d 254, 256 (Utah Ct. App. 2004).

[75]Utah Code Ann. § 63-30-11(3)(a)(ii) (2003).

support of their argument, the defendants cite *Yearsley v. Jensen*.[76] In *Yearsley*, the Utah Supreme Court affirmed a district court's decision not to grant leave to amend a complaint where the plaintiff initially sought damages only for assault and battery but later sought to add a claim for malicious prosecution and unlawful arrest.[77] The Utah Supreme Court held: "By no stretch of the facts can a claim for the physical beating *be construed* to include a claim for malicious prosecution."[78] The court also said that the plaintiff's "only demand for damages was for physical and emotional distress arising from the physical beating. *Not even an obscure reference* was made to any other misconduct."[79] The court concluded its discussion by stating, "a notice of assault and battery does not *contemplate* a malicious prosecution or a false arrest claim. . . . There must be enough specificity in the notice to inform as to the nature of the claim so that the defendant can appraise its potential liability."[80]

Far from supporting the defendants' position, *Yearsley* cuts against it. Nowhere in *Yearsley* did the Utah Supreme Court require the plaintiff to list with exactitude the title of each cause of action. Instead, the court spoke of construed allegations, obscure references, and "enough specificity in the notice to inform as to the *nature of the claim*."[81] Indeed, the statute

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[76]798 P.2d 1127 (Utah 1990).

[77]*Id.* at 1129.

[78]*Id.* (emphasis added).

[79]*Id.* (emphasis added).

[80]*Id.* (emphasis added).

[81]*Id.*

itself requires only a description of the *nature* of the claim, not a specific, count-by-count listing of each cause of action sufficient to withstand scrutiny in a code pleading jurisdiction.

After reviewing the Jensens' notice of claim, the court finds that it alleges facts from which defendants easily could have anticipated each of the Jensens' state constitutional and tort causes of action. And defendants admit that the infliction of emotional distress cause of action satisfies the notice of claim requirements.[82] Since the notice of claim complies with § 63-30-11(3)(a)(ii), defendants' first argument is without merit.

Defendants' second argument — that the notice of claim fails to allege the individual defendants acted with fraud or malice[83] — likewise fails. The defendants cite no Utah case holding that a notice of claim must not only describe conduct that is malicious or fraudulent but also must contain the specific words "malice" or "fraud." Utah courts define "actual malice" or "legal malice" as "conduct that manifests a reckless disregard or indifference to the rights and safety of others."[84] The Jensens' notice of claim describes defendants' conduct in that fashion, including repeated alleged instances of knowingly making false statements to Utah courts to achieve their ends. This sufficiently alleges malice or fraud for purposes of the UGIA and permits the Jensens' state claims to proceed.

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[82]Docket No. 24, at 26.

[83]*See* Utah Code Ann. § 63-30-4(4)(a) (2003).

[84]*Biswell v. Duncan*, 742 P.2d 80, 84 (Utah Ct. App. 1987).

2. Utah Constitutional Violations

The defendants also argue that the Jensens' Utah constitutional claims must be dismissed because the constitutional provisions allegedly violated are not self-executing. The court agrees in part with defendants' arguments.

Damages are recoverable for violations of the Utah Constitution only if the provision violated is self-executing, and then only when three elements from *Spackman ex rel. Spackman v. Board of Education* are met: (1) the plaintiff suffered a flagrant violation of constitutional rights; (2) existing remedies do not redress the plaintiff's injuries; and (3) equitable relief was and is wholly inadequate to protect the plaintiff's rights or redress the plaintiff's injuries.[85] The Jensens allege that defendants violated four provisions of the Utah Constitution: (1) Article I, § 1, dealing with inherent and inalienable rights; (2) Article I, § 7, the Due Process Clause; (3) Article I, § 14, dealing with unreasonable searches and seizures; and (4) Article I, § 25, which reserves unenumerated rights to the people. For claims under these sections to be viable, the court must first determine whether these provisions are self-executing. If they are, the court must then decide whether the three-part test is satisfied.

a. Are the Provisions Self Executing?

Under Utah law,

> [a] constitutional provision is self-executing if it articulates a rule sufficient to give effect to the underlying rights and duties intended by the framers. In other words, courts may give effect to a provision without implementing legislation if the framers intended the provision to have immediate effect and if 'no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a

[85] *Spackman ex rel. Spackman v. Bd. of Educ.*, 16 P.3d 533, 537–39 (Utah 2000).

> duty imposed . . . .' Conversely, constitutional provisions are not self-executing if they merely indicate a general principle or line of policy without supplying the means for putting them into effect.[86]

The Utah Supreme Court has previously held that Article I, § 7 is self-executing,[87] and defendants here assume that Article I, § 14 is self-executing. The two contested provisions are therefore §§ 1 and 25 of Article I. Based on the *Spackman* rule quoted above, the court holds that Article I, § 1 is self-executing. This section states: "All men have the inherent and inalienable right to enjoy and defend their lives and liberties; . . . and petition for redress of grievances . . . ."[88] Utah citizens' ability to enjoy their "inherent and inalienable right to enjoy and defend their lives and liberties" is not contingent upon implementing legislation.

In contrast, the court holds that Article I, § 25 is not self-executing. This provision states: "This enumeration of rights shall not be construed to impair or deny others retained by the people."[89] Section 25 is very similar to the Ninth Amendment to the U.S. Constitution, which the court has already held cannot by itself provide the basis for a § 1983 claim. And § 25 is more of a "general principle or line of policy without" that does not "supply[] the means for putting [it] into effect."[90] Accordingly, the Jensens' eighth cause of action (based on Article I, § 25) fails to state a claim upon which relief may be granted and must be dismissed.

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[86]*Id.* at 535 (quoting *Bott v. DeLand*, 922 P.2d 732, 737 (Utah 1996)).

[87]*See id.* at 536.

[88]Utah Const. art. I, § 1.

[89]*Id.* art I., § 25.

[90]*Spackman*, 16 P.3d at 535 (quotation marks omitted).

b. Are Money Damages Available for the Self-Executing Provisions?

Though §§ 1, 7, and 14 of Article I are self-executing, the court must still determine whether damages are appropriate for violations of these sections. The answer to this question depends on whether the complaint's allegations establish these three elements from *Spackman*: "[f]irst, a plaintiff must establish that he or she suffered a 'flagrant' violation of his or her constitutional rights"; "[s]econd, a plaintiff must establish that existing remedies do not redress his or her injuries"; and "[t]hird, a plaintiff must establish that equitable relief, such as an injunction, was and is wholly inadequate to protect the plaintiff's rights or redress his or her injuries."[91]

Based on these factors, the court holds that, at this early stage of the litigation, it cannot say with certainty that damages would be inappropriate. The alleged violations of these sections appear to be "flagrant" and equitable relief was and is "wholly inadequate" to redress these wrongs; *Spackman*'s first and third elements are therefore satisfied. *Spackman*'s second element, however, is the difficult one. The Jensens spend considerable time discussing how their state claims differ from their federal claims, but they spend little time demonstrating that existing *remedies*, under § 1983 and other bodies of law, are inadequate to redress the injuries they suffered. Likewise, the state refers only generally to § 1983 as providing sufficient

[91] *Id.* at 538–39.

compensation, not perhaps appreciating that whether the federal cause of action under § 1983 provides sufficient redress for a state constitutional claim is an open question in Utah.[92]

The court is well aware that it must "use [its] common law remedial power cautiously and in favor of existing remedies."[93] That determination, however, must be made with a precise understanding of the nature of a plaintiff's injuries and the remedies available to address them. The court can have only a general understanding of the plaintiff's injuries at this point in the process, and therefore any firm determination of this issue is premature. Accordingly, the court denies the motion to dismiss the Jensen's remaining state constitutional law claims, believing that as this litigation progresses the remedies issue will come into clearer focus.

IV. The Doctor Defendants' Motion to Dismiss

The Jensens have asserted claims against Dr. Lars Wagner, Dr. David Corwin, Dr. Cheryl Coffin, and Dr. Karen Albritton — doctors at Primary Children's Medical Center — for their role in the events of 2003. These defendants filed a separate motion to dismiss. Where the doctor defendants' and State employee defendants' arguments overlap, the court will refer to its earlier discussion.

A. Collateral Estoppel

The doctor defendants first argue that the Jensens are estopped from bringing their claims because they were all addressed in the juvenile court proceedings. In their opening

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[92]*See Spackman*, 16 P.3d at 538 n.10 ("We do not reach the question of whether existing federal law remedies should preclude a state court from awarding damages for a state constitutional tort.").

[93]*Id.* at 539.

memorandum, the doctors invoked collateral estoppel as the relevant estoppel species. In the doctors' reply memorandum, however, collateral estoppel had evolved into judicial estoppel.

A legal theory may not make its first appearance in a reply memorandum. "A reply memorandum must be limited to rebuttal of matters raised in the memorandum opposing the motion . . . ."[94] And failure to raise an issue in an opening memorandum constitutes waiver of that issue.[95] So to the extent judicial estoppel differs from collateral estoppel, the court will disregard those differences and base its ruling on collateral estoppel only — the issue defendants raised in their opening memorandum.

Under Utah law, the four elements of collateral estoppel or issue preclusion are:

> [1] [T]he party against who issue preclusion is asserted must have been a party to or in privy with a party to the prior adjudication; [2] the issue decided in the prior adjudication must be identical to the one presented in the instant action; [3] the issue in the first action must have been completely, fully, and fairly litigated; and [4] the first suit must have resulted in a final judgment on the merits.[96]

Since the court at this stage of the proceedings must accept the complaint's allegations as true, the court finds that juvenile court proceedings in 2003 do not collaterally estop the Jensens' claims. Specifically, the second and third elements are not met. This case concerns whether events before and during the juvenile court proceedings violated the Jensens' rights under the Utah and United States Constitutions — issues the juvenile court did not consider. And the

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[94]DUCivR 7-1(b)(3).

[95]*See King of the Mountain Sports, Inc. v. Chrysler Corp.*, 185 F.3d 1084, 1091 n.2 (10th Cir. 1999); *State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 984 n.7 (10th Cir. 1994); *Codner v. United States*, 17 F.3d 1331, 1332 (10th Cir. 1994).

[96]*Brigham Young Univ. v. Tremco Consultants, Inc.*, 110 P.3d 678, 686 (Utah 2005) (quotation marks omitted).

Jensens' complaint is replete with allegations that the issues were not fairly litigated because of fraud and deceit. These allegations, which the court must accept as true, prevent a finding that the earlier proceedings were "fully[] and fairly litigated."[97] The court therefore denies this portion of the doctor defendants' motion to dismiss.

B. The Jensens' § 1983 Claims

1. Substantive Due Process

The doctors characterize the Jensens' complaint as asserting a "right to absolute parental autonomy . . . to raise their child free from any state interference" and argue that the United States Constitution does not protect such a right. The doctors mischaracterize the Jensens' claim. The complaint does not, as the doctors assert, allege the right to be *absolutely* free from state interference. Rather, it seeks to vindicate allegedly unconstitutional deprivations of the Fourteenth Amendment interests identified earlier as the right to familial association and a parent's right to direct the care and upbringing of children. As discussed in above, the Constitution protects these rights, and the complaint's allegations are sufficient to survive a motion to dismiss.

2. Substantive Due Process Violations Pleaded as to Each Doctor

The doctors next argue that the complaint fails to state a claim for substantive due process violations against them because their alleged conduct does not "shock the conscience of federal judges."[98] Based on recent Tenth Circuit precedent, this standard does not apply in this case.

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[97] *Id.*

[98] Docket No. 18 (citing *Collins v. City of Harker Heights*, 503 U.S. 115, 126 (1997)).

In *Dubbs v. Head Start, Inc.*, a district court dismissed parents' substantive due process claims (that were very similar to those the Jensens allege here) because the conduct alleged did not "shock the conscience of the court."[99] The Tenth Circuit reversed, holding that "the district court misapprehended the legal standard applicable to purported substantive due process rights that — like the right to consent to medical treatment for oneself and one's minor children — may be 'objectively, deeply rooted in this Nation's history and tradition.'"[100] The circuit continued: "While the 'shocks the conscience' standard applies to tortious conduct challenged under the Fourteenth Amendment, it does not exhaust the category of protections under the Supreme Court's substantive due process jurisprudence, or eliminate more categorical protection for 'fundamental rights' as defined by the tradition and experience of the nation."[101] Though the circuit ultimately "decline[d] to resolve the difficult questions regarding the standard to be applied to this claim because the district court gave only cursory treatment to the parents' substantive due process claims," its discussion strongly indicates that the "shock the conscience" standard does not govern the Jensens' claims.

Rather than applying the "shocks the conscience" standard here, the court takes its cue from the Tenth Circuit's cite to *Washington v. Glucksberg*, which in turn cited *Reno v. Flores* for the proposition that government conduct that infringes upon fundamental liberty interests (such

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[99]336 F.3d 1194, 1202 (10th Cir. 2003).

[100]*Id.* at 1203 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)).

[101]*Id.* (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 848–51 (1998)).

as the Jensens' claimed liberty interests here) is unconstitutional "'unless the infringement is narrowly tailored to serve a compelling state interest.'"[102] The court will apply this standard.

Before reaching the merits, the court acknowledges the seemingly inconsistent standards mandated by *Dubbs* and *Griffin*. In Section III.D, the court responded to the State employee defendants' motion to dismiss by applying *Griffin*, which mandates a "balancing test" and a hunt for an "undue burden" when liberty interests such as familial association are at issue.[103] *Dubbs*, in contrast, points to the "narrowly tailored / compelling interest" test for substantive due process rights (such as a parent's right to direct a child's medical care) that "may be 'objectively, deeply rooted in this Nation's history and tradition.'"[104] The right to enjoy familial association arguably is as deeply rooted in this Nation's history as a parent's right to direct medical care. So on one level, it makes little sense to assign different tests to these two rights based on labels like "liberty interest" versus "substantive due process right" — particularly where the Tenth Circuit has previously held that the familial right of association is in fact a *subset* of a substantive due process right.[105]

One possible explanation for this apparent discrepancy is that *Glucksberg*'s rule, identified *Dubbs*, that "the Fourteenth Amendment 'forbids the government to infringe . . . "fundamental" liberty interests *at all*, no matter what process is provided, unless the infringement

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[102]*Glucksberg*, 521 U.S. at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

[103]*Griffin v. Strong*, 983 F.2d 1544, 1547 (10th Cir. 1993).

[104]*Dubbs*, 336 F.3d at 1205 (quoting *Glucksberg*, 521 U.S. at 720–21).

[105]*Griffin*, 983 F.2d at 1547.

is narrowly tailored to serve a compelling state interest'"[106] supercedes the balancing test/undue burden requirement from *Griffin*. Perhaps another explanation is that finding an "undue burden" is equivalent to finding that no compelling state interest exists, or that the State's means were not narrowly tailored. But this seems unlikely, particularly because the Supreme Court recently applied the narrowly tailored/compelling state interest standard in a substantive due process case[107] despite the existence and applicability of the "undue burden" standard to other substantive due process rights.[108] If the two tests were identical, the continued distinction would be of no use.

One certainty emerges from this tangled web of apparent substantive due process inconsistencies: this court is not the proper entity to resolve this debate. The court is bound by Tenth Circuit precedent. Both *Dubbs* and *Griffin* appear to be good law, so the court will apply two different tests — the balancing test to the motion to dismiss the associational claims, and the narrowly tailored/compelling state interest test to the motion to dismiss the substantive due process claim for invasion of the Jensens' right to direct P.J.'s medical care.

As to the latter, the doctors claim that they did not infringe the Jensens' substantive due process rights because they merely diagnosed P.J.'s condition and reported Mr. and Mrs. Jensen to DCFS as Utah law required after the Jensens failed to enroll their son in chemotherapy. The Jensens, in turn, accuse the doctors of violating the Jensens' substantive due process rights by,

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[106]521 U.S. at 721.

[107]*See, e.g., Lawrence v. Texas*, 539 U.S. 558, 593 (2003).

[108]*Planned Parenthood v. Casey*, 505 U.S. 833, 876–78 (1992).

among other things, misrepresenting P.J.'s condition to the juvenile court, refusing to order specific medical tests that would have conclusively identified P.J.'s cancer, and ignoring or misrepresenting evidence that was inconsistent with their diagnosis.

Since these arguments appear in a motion to dismiss, and since the Jensens have alleged numerous misrepresentations, the court must hold that the Jensens' complaint adequately alleges a substantive due process violation. There is no compelling state interest in falsifying or misrepresenting evidence to a juvenile court. But it should go without saying that this holding assumes the doctors actually did what plaintiffs allege; to survive summary judgment, the Jensens must put forth evidence in support of their claims.

3. P.J.'s Liberty Interests

In Section III.C.1, the court held that, under the facts of this case, P.J. had no liberty interest in refusing medical treatment. The court grants this portion of the doctors' motion to dismiss for the same reasons discussed in that section.

4. Procedural Due Process

Like the State employee defendants, the doctor defendants argue that the Jensens fail to state a claim for deprivation of procedural due process. In particular, the doctors argue that the most detailed allegations of procedural due process violations relate to the *State* defendants' actions. They assert that the Jensens' failure to provide specific allegations as to each doctor is fatal to this claim.

The trouble with this argument is that it ignores Tenth Circuit precedent. In *Northington v. Marin*, the circuit discussed tort law principles of joint and several liability and then said,

"[t]hese rules apply in § 1983 actions. Persons who concurrently violate others' civil rights are jointly and severally liable for injuries that cannot be apportioned."[109]

Here, the complaint implicates all defendants — the State employees and the doctors — in its allegations of constitutional deprivations. The injuries the Jensens assert as a result of the alleged failure to conduct confirmatory tests and misrepresentations to the Utah court "cannot be apportioned." This case seems to fit squarely within the rule from *Northington*; as such, the court denies the doctors' motion to dismiss the procedural due process claim.

5. Ninth Amendment

The doctors, like the State defendants, ask the court to dismiss the Jensens' Ninth Amendment claim. The court grants this motion for the same reasons outlined in Section III.G above.

6. Malicious Prosecution

The doctors next ask the court to dismiss the Jensens' § 1983 and state tort malicious prosecution claims because the Jensens' pleas in abeyance preclude them from establishing the "favorable termination" element of these causes of action. As noted above, it is too early in the proceedings to determine with certainty whether the Jensens' plea agreement was procured by unfair means. If so, this element may be satisfied. The court therefore DENIES this motion for the same reasons discussed in Section III.F above.

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[109]102 F.3d 1564, 1569 (10th Cir. 1996).

D. Absolute Immunity

The doctors claim they are entitled to absolute immunity for all the Jensens' cognizable claims because they "were integral parts of the judicial process"[110] — that is, their actions were allegedly limited to those mandated by law (reporting their diagnosis, P.J.'s condition, and the Jensens' decision to the State) and to participation in the juvenile court proceedings.[111] The doctors thus seek protection under *Brisco v. LaHue*'s wide grant of "integral" immunity. The court agrees in part with this assertion.

When deciding whether a defendant is absolutely immune from suit, this court must "apply a 'functional approach . . . which looks to the nature of the function performed, not the identity of the actor who performed it.'"[112] "'The more distant a function is from the judicial process, the less likely absolute immunity will attach.'"[113] For this reason, malicious prosecution defendants are not entitled to absolute immunity if they were complaining witnesses — "the person (or persons) who actively instigated or encouraged the prosecution of the plaintiff"[114] — whose "testimony [was] relevant to the manner in which" the plaintiff's prosecution was initiated or perpetrated.[115]

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[110]*Briscoe v. LaHue*, 460 U.S. 325, 335 (1983).

[111]*See* Docket 18, at 38.

[112]*Malik v. Arapahoe County Dep't of Soc. Servs.*, 191 F.3d 1306, 1314 (10th Cir. 1999) (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993)).

[113]*Id.* (quoting *Snell v. Tunnell*, 920 F.2d 673, 687 (10th Cir. 1999)).

[114]*Anthony v. Baker*, 955 F.2d 1395, 1399 n.2 (10th Cir. 1992).

[115]*Id.* at 1401.

In this case, the complaint alleges that Dr. Wagner's and Dr. Albritton's testimony instigated or encouraged the Jensens' juvenile court case and was relevant to the manner in which those proceedings occurred. The Jensens specifically allege that these doctors did not act in good faith — they allege that Dr. Wagner refused to order tests that would have confirmed the Ewing's sarcoma diagnosis, and that he threatened them by stating, "If you don't come in for treatment, I will take your son." And they allege that Dr. Albritton made several factual misrepresentations and omissions to the juvenile court during the courts of the proceedings. If these facts are true — as the court must assume on this motion to dismiss — these two doctors are not entitled to absolute immunity.

On the other hand, Dr. Corwin and Dr. Coffin did not "initiate or perpetuate the prosecution." Accepting all the facts alleged in the complaint as true, Dr. Corwin attempted to mediate the dispute between the Jensens and PCMC, and Dr. Coffin diagnosed P.J.'s disease. Dr. Corwin and Dr. Coffin are therefore entitled to absolute immunity.

E. Qualified Immunity

The doctors invoke qualified immunity as a separate defense. Since the court has held that Dr. Wagner and Dr. Albritton are not absolutely immune, it will examine whether these two doctors are qualifiedly immune from suit.

As discussed in above, the qualified immunity test consists of two parts: first, do the facts as alleged show the violation of a constitutional right? And second, was that right clearly established?[116] A right is clearly established when its contours are "sufficiently clear that a

[116]*See Saucier v. Katz*, 533 U.S. 194, 200 (2001).

reasonable official would know that what he is doing violates that right."[117] If the answer to either question is "no," the defendant is entitled to qualified immunity.

1. Substantive Due Process

The doctors first claim they are qualifiedly immune from the Jensens' substantive due process claims. They do not concede the first element but jump directly to the second and argue that the Jensens' alleged constitutional rights were not clearly established.

Rather than skip the first inquiry, the court holds that the facts as alleged here violate the Jensens' Fourteenth Amendment rights for the reasons discussed above. As to the second element, these rights were clearly established in 2003. Defendants' arguments to the contrary are misplaced because they focus solely on the Utah law that required them to report instances of suspected abuse or neglect. But the report itself is not the issue. Whatever reporting requirements Utah law imposed, the law obviously did not require them to threaten the Jensens, refuse to perform confirmatory tests, or make false, incomplete, or misleading statements to Utah courts, as the Jensens allege they did, with knowledge that these actions would curtail the Jensens' right to direct P.J.'s care and harm their family. Whether this conduct actually occurred is a vigorously disputed issue of fact to be determined later — the court must accept these allegations as true at this early stage. And based on these allegations, qualified immunity is inappropriate because the doctors' actions violated clearly established law.

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[117] *Id.* (quotation marks omitted).

2. Procedural Due Process

The doctors also argue that they did not violate the Jensens' procedural rights by diagnosing P.J., reporting potential neglect, and testifying in juvenile proceedings. Assuming without deciding that the doctors' position is correct, they again misunderstand the nature of the Jensens' claim, which goes to the fairness of those proceedings.[118] The plaintiffs allege that Dr. Wagner and Dr. Albritton made multiple factual misrepresentations during these events. Such omission or falsehoods would undoubtedly affect the fairness of the proceedings. Based on these alleged facts, qualified immunity is inappropriate.

F. Violations of the Utah Constitution

The doctors next ask the court to dismiss the Jensens' Utah Constitution claims because the provisions allegedly violated "do not substantially differ from their federal counterparts."[119] Their argument is based on *State v. Harris*, where the Utah Supreme Court said, "[w]e acknowledge that as a general rule, we will not engage in a state constitutional analysis unless an argument for different analyses under the state and federal constitution is briefed."[120]

Defendants' argument is misplaced for at least two reasons. First, the sentence in *Harris* immediately following the one quoted above reads: "However, we apply this rule in cases where a party relies nominally on state constitutional provisions while actually relying on the parallel

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[118]*See supra* Section III.E; *Zinermon v. Burch*, 494 U.S. 113, 125 (1990).

[119]Docket No. 18, at 43.

[120]104 P.3d 1250, 1258 (Utah 2004) (brackets and quotation marks omitted).

federal constitutional provisions and analysis based on them."[121] When drafting their complaint, the Jensens relied equally on the United States and Utah constitutions: four causes of action were based on each. To this point, then, there has been no "nominal" reliance on the state constitution.

The second problem is related to the first. Both the Federal Rules of Civil Procedure and their Utah counterparts require only "a short and plain statement of the claim showing that the pleader is entitled to relief."[122] At this early stage, it would be premature for the court to dismiss the Jensens' state constitutional claims for lack of detailed briefing when the complaint satisfies notice pleading requirements.

That said, the court's holding in response to the State defendants' motion to dismiss — that Article I, § 25 is not self-executing — applies with equal force to the doctors. The court therefore dismisses the Jensens' eighth cause of action as against the doctors.

G. Utah Tort Claims

Finally, the doctors ask the court to dismiss the Jensens' tort causes of action. To the extent their arguments overlap with the State defendants', the court denies their motion for the same reasons already discussed.

The doctors also argue a few distinct points. First, they cite Utah Code Ann. § 63-30-10 for the proposition that the Utah Governmental Immunity Act does not waive immunity for causes of action arising out of "infliction of mental anguish." This language, which appears in the subsection the doctors cite, must be read in context. The entire statute reads: "Immunity from

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[121] *Id.* (brackets and quotation marks omitted).

[122] Fed. R. Civ. P. 8(a); *see also* Utah R. Civ. P. 8(a).

suit of all *governmental entities* is waived for injury proximately caused by a negligent act or omission of an employee except if the injury arises out of . . . infliction of mental anguish."[123] The Act defines a governmental entity as "the state and its political subdivisions as defined in this chapter."[124] Thus, by its plain language, the statute does not concern the liability (or immunity) of individuals such as the doctors, but rather the political subdivisions of the state.

The doctors next argue that the Jensens fail to state a claim for intentional infliction of emotional distress because they fail to plead that the doctors acted with the "purpose" of inflicting emotional distress. Pleading a "purpose" of inflicting emotional distress is one option for establishing the first element of this cause of action, but a plaintiff may also state a claim by alleging the defendant "*acted in reckless disregard of the likelihood of causing*[] emotional distress."[125] The Jensens' complaint sufficiently alleges "reckless disregard" to survive a Rule 12(b)(6) motion. And it also adequately alleges the second prong, "outrageous and intolerable" conduct.[126] "It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery."[127] The court finds that facts alleged in the complaint satisfy this standard.

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[123]Utah Code Ann. § 63-30-10(3) (2003).

[124]*Id.* § 63-30-2(3) (2003).

[125]*Prince v. Bear River Mut. Ins. Co.*, 56 P.3d 524, 535 (Utah 2002) (emphasis added).

[126]*Schuurman v. Shingleton*, 26 P.3d 227, 233 (Utah 2001).

[127]*Id.* (brackets and quotation marks omitted).

V. Motion to Certify

The final motion before the court is the Jensens' motion to certify the following question to the Utah Supreme Court:

> Have plaintiffs' Fifth, Sixth, Seventh, and Eighth Causes of Action adequately alleged a claim under the Utah state constitution within the meaning of *Spackman v. Board of Education*, 2000 UT 87, 16 P.3d 533 (2000)?[128]

Rule 41 of the Utah Rules of Appellate Procedure provides the mechanism by which this court may certify a question of law to the Utah Supreme Court. The rule requires this court to submit a certification order to the Utah Supreme Court that states: (1) the question of law to be answered; (2) that the question certified is a controlling issue of law in this proceeding; and (3) that there appears to be no controlling Utah law.[129]

This court may certify a question of law to the Utah Supreme Court, but it need not do so each time "there is doubt as to local law."[130] As the Supreme Court has stated:

> In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment.[131]

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[128]Pls.' Mot. to Certify Question of Law to Utah Supreme Court (Docket No. 32), at 2, *Jensen v. Utah*, Case No. 2:05-CV-00739 PGC (D. Utah filed Jan. 9, 2006).

[129]Utah R. App. P. 41(c).

[130]*Lehman Bros. v. Schein*, 416 U.S. 386, 390–91 (1974).

[131]*Meredith v. City of Winter Haven*, 320 U.S. 228, 234 (1943).

And the Tenth Circuit has emphasized the Supreme Court's teaching that "'[n]ovel, unsettled questions of state law, however, not "unique circumstances," are necessary before federal courts may avail themselves of state certification procedures.'"[132]

The Jensens' motion comes very early in these proceedings. At this early point, the court cannot conclude that the question they want certified presents a controlling issue of Utah law — Rule 41(c)'s second element. And it is unclear whether Rule 41(c)'s third element, an absence of controlling Utah law, is met. The court therefore denies the Jensens' motion to certify.

CONCLUSION

The court GRANTS the State of Utah's motion to dismiss (# 25) and DISMISSES the State as a defendant. All claims against it fail because of sovereign immunity.

The court GRANTS IN PART and DENIES IN PART the State employees' and doctors' motions to dismiss (# 17, # 23). The Jensens' fourth cause of action (based on the Ninth Amendment) and eighth cause of action (based on Article I, § 25 of the Utah Constitution) fail to state claims upon which relief may be granted. The court thus GRANTS defendants' motion and DISMISSES these two claims against all defendants. The court also GRANTS defendant Richard Anderson's motion to dismiss all claims against him in his official capacity for this same reasons it dismisses the claims against the State of Utah. The court GRANTS defendants' motion to dismiss P.J.'s malicious prosecution claim against all defendants because he fails to allege that he was prosecuted. And the court GRANTS defendants' motion to dismiss P.J.'s first

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[132]*Copier ex rel. Lindsey v. Smith & Wesson Corp.*, 138 F.3d 833, 838 (10th Cir. 1998) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997)).

cause of action because, under the facts of this case, he had no liberty interest in refusing medical treatment. The court also holds that Dr. Corwin and Dr. Coffin are entitled to absolute immunity; the court therefore GRANTS their motion and DISMISSES all claims against them. The court DENIES the defendants' motions in all other respects.

Finally, the court DENIES the Jensens' motion to certify (# 32) at this early stage of the proceedings.

SO ORDERED.

DATED this 16th day of June, 2006.

BY THE COURT:

Paul G. Cassell
United States District Judge

Addendum
Exhibit 2

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE CITY
SALT LAKE COUNTY, STATE OF UTAH

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BARBARA JENSEN, Et al,	)	
	)	
Plaintiffs,	)	Case No. 050912502 CR
	)	
vs.	)	MOTION HEARING
	)	
STATE OF UTAH, KARI CUNNINGHAM, Et al.,	)	
	)	
	)	
Defendants.	)	

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BE IT REMEMBERED that on the 26th day of January 2009, commencing at the hour of 9:03 a .m., the above-entitled matter came on for hearing before the HONORABLE JOSEPH C. FRATTO, sitting as Judge in the above-named Court for the purpose of this cause, and that the following proceedings were had.

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A P P E A R A N C E S

For the Plaintiffs:	KARRA J. PORTER SARA SPENCER ROGER P. CHRISTENSEN Attorneys at Law Christensen & Jensen 15 West South Temple, Suite 800 Salt Lake City, Utah 84101
For the Defendants, Cunningham and Eisenman:	MATTHEW D. BATES Deputy Salt Lake County District Attorney 111 East Broadway, #400 Salt Lake City, Utah 84111
For the Defendant, Eisenman:	SCOTT D. CHENEY BRIDGET K. ROMANO Assistant Attorneys General 160 East 300 South, Sixth Floor Salt Lake City, Utah 84111
For the Defendant, Cunningham:	JONI J. JONES Assistant Attorney General 160 East 300 South, Sixth Floor Salt Lake City, Utah 84111
For the Defendant, Wagner:	ANDREW M. MORSE R. SCOTT YOUNG DAVID G. WILLIAMS Attorneys at Law Snow, Christensen & Martineau 10 Exchange Place, #1100 Salt Lake City, Utah 84145
For the Defendant: Anderson:	KRISTIN A. VANORMAN Attorney at Law Strong & Hanni 3 Triad Center, #500 Salt Lake City, Utah 84180

* * *

memorandum. I--I looked at--

THE COURT: Well, I wonder--Mr. Morse, I wonder if you can tell me, is there--is there an ability here to sort of make an overview as to--as to why this is a res judicata? What's--I mean, this is a transfer, if that's the correct phrase, from the Federal Court to this Court.

MR. MORSE: Correct, your Honor.

THE COURT: All right.

MR. MORSE: I, frankly, don't know what the difference would be between res judicata and law of the case. They both bar the plaintiffs' claims here.

The plaintiffs have pointed out, and I think technically correctly, that res judicata, technically, may not apply within the same case. What they failed to tell you in that same case of Kerr McGee is that law--law of the case does bar their claims. It's the same rule. You have one bite at the apple and trial judges are not permitted to second-guess what another trial judge does within the same case.

You would be no more able to second-guess Judge Dever than you would Judge Stewart, even though Stewart is in a different Fed--a different court system.

The--the--if the plaintiffs do not like what happened at the trial court in--across the street in Federal Court, they're free to file an appeal, which is what they've done.

seriously.

At no time did he say yes, we accept it as true, we, you know, take that as a higher authority than a different institution, there is no evidence whatsoever that that would-- that that allegation is true.

THE COURT: Ms. Vanorman, I'm going to stop you there. Your time has expired.

MS. VANORMAN: All right. Thank you.

THE COURT: I think I understand your appreciate.

MS. VANORMAN: Thank you.

THE COURT: Appreciate your argument. Thank you.

Ms. Porter?

MS. PORTER: Thank you, your Honor.

THE COURT: For the plaintiff.

MS. PORTER: Pardon?

THE COURT: For the plaintiff.

MS. PORTER: Yes.

THE COURT: Plaintiffs.

MS, PORTER: Your Honor, it is obvious from both the briefing and from the argument that we've heard today that the defendants place most of their eggs in a res judicata basket.

The problem is, res judicata does not apply unless there are two separate cases. It's pretty obvious, when you look at all of our case law, that's just not an argument that they have available to them.

The--so, what happens then is, recognizing that we were correct on that, two arguments were made in reply memos; one was, well, okay, issue preclusion anyway, can't we still argue that? And citing the Oman case. No, actually, if you look at the Oman case, that case involved two subsequent cases.

And there's a reason for that, your Honor, you know it's a well-established principle of res judicata that any claims that, whether they were made or could have been made, you know, once the case is over, then those cas--those claims are precluded. So, that's why there's the two-case requirement for that.

And that--and the defendants have--some have conceded, some have just simply not cited any authority to the contrary that we're right, res judicata not available here.

So, what happens is, in the reply memo, for the first time, first time the words have ever been uttered by any of the defendants is in the reply memo. And they say, well, you know, okay, maybe res judicata doesn't really apply here but we--we should have argued law of the case.

It was kind of interesting because of the defense counsel said, we didn't attempt--the plaintiffs did not attempt to argue any of the exceptions to the law of the case doctrine, so we were basically agreeing with them. How would we? The first time we even saw it or had any inkling that

they were going to argue this was Friday afternoon in their reply memorandum.

So, there are some--several problems with this attempt and I'm going to explain how we have severely prejudiced if they are allowed to even argue law of the case.

THE COURT: Let me ask this--

MS. PORTER: Sure.

THE COURT: I don't mean to interrupt, but let me ask this. To what extent, in your view, do I handle Judge Stewart's decision?

MS. PORTER: We--we--

THE COURT: How should I--what do I do with it?

MS. PORTER: Basically you can read it and find whatever informational value you think it might have or something, but it is not binding, it's not controlling. If you don't agree with it, you can and we believe, should, do your own independent evaluation of the record that has been provided to you and then apply that to the State Constitution.

And in a few minute--in a couple of minutes, I'm going to give you the very authority to do that, with an only two-week-old Court of Appeals case and it's not cited because again, the first time they even suggested law of the case was just Friday afternoon.

I do want to clarify one thing. I believe there was a statement made that law of the case only applied if there's

no final--been no final ruling, et cetera; but I think that was a misstatement or a misspeaking, perhaps. Actually, one of the most common uses of the law of the case, which I know from painful experience 15 years ago, is actually after there's been a final order, it's gone up on appeal, goes back on some other issue and the Court--and the Appellate Courts typically use law of the case to say, now, you know, to the trial court, whatever issues you're going to decide here, don't be re-looking at any of the ones that have already been resolved. So, it is actually most commonly used with respect to--to whether it's final or not final.

THE COURT: May I ask you, what is the difference between law of the case and res judicata?

MS. PORTER: Principally--

THE COURT: If any?

MS. PORTER: Well, there's--there's several principal differences and actually I'm going to get into some of those. There are different elements, there are different defenses available to a claim of res judicata versus law of the case. It--the most obvious difference is that res judicata only applies when there are two separate cases. Law of the case only applies when there's a single case; but if--if I may, and if you feel in a minute that I haven't given you more detail on some of these differences, but I think you'll see in just a second what some of the very specific

differences are, because this is why we are severely prejudiced if they are allowed to make an argument, an untimely argument on law of the case.

And I don't think I have to point that I--that the Utah Supreme Court has held numerous times that an argument raised for the first time in a reply memorandum is not proper and--and shouldn't be considered and is unfair to the opposing party.

The defendants here, at least one of the defendants, said, well, one of the cases that you cite actually had some discussion about law of the case in it, as a--as a different issue. I would be surprised if that wasn't true of every single case that any party cited that has more than one issue that's been addressed, but they--they didn't cite it, it's not--it wasn't cited for law of the case principles. What they're basically arguing is that we should have read all of the cases and sifted through and found and said, well, here's an argument that maybe they should have made, so let's go ahead and respond to it.

They, you know, we don't question other people's strategy and what arguments they choose to make. There may be reasons they thought they could argue res judicata, because for one thing, res judicata, according to them, you have no--no discretion. You're just--your hands are tied under res judicata. Quite--it's quite the opposite with law of the

case. So, that well be a strategic decision that they made.

But some of the--the prejudice that we have here relates to these differences between these concepts. First of all, we've had no chance to brief it and it's too late now. The--the reference to the possibility of supplemental briefing, you know, one reason we have this sort of expedited briefing hearing schedule was so that the--to allow the--the rest of the discovery to be completed and trial to--to occur, because we raised the concern that it's now three-and-a-half years since the lawsuit was filed and we haven't been able to get to trial yet.

So, no, you know, they chose, they were allowed to choose the scope of their motions and they did; but we also would have done--approached our own briefing differently had they argued law of the case. For example, they have re--attempted to re-hash several purely legal rulings that already were ruled on by Judge Cassell and were uninterrupted or hadn't--were not addressed or modified by Judge Stewart.

So, for example, you know that 20 pages that we spent talking about, how Brigham Young was arrested and you know, the framers and all of that information, all of that was run past Judge Cassell earlier, because they made the same argument that we had supposedly not shown how the State Constitutional protections were broader. We did all that with Judge Cassell, he ruled, yes, they are, on three of them.

There was a fourth one that he dismissed, but it--you know, had--had they argued law of the case, we would have said great, that just saved us 20 pages of arguing the history of the State Constitution.

Same thing on Spackman. They made the same argument to Judge Cassell that were unmodified by Judge Stewart--I mean, pardon me. They made the same argument to Judge Cassell who made legal rulings about the law itself that Judge Stewart did not modify or disagree with, with relation to Spackman. We wouldn't have had to brief all that because we could have said, well, if we're going to argue law of the case, here's some nice ones that help us quite a bit.

You know, Judge Cassell specifically ruled that the--that--in this particular case, equitable relief would not be adequate. But here, we're having to brief it again. You know, he made specific, and when he did cite his--for one--for a different point, we cited his opinion but we didn't even provide the Court a copy of it because they weren't arguing law of the case.

Same thing with the effect of the Jensens' plea in abeyance. Judge Cassell ruled as a matter of law that--that such a plea in abeyance does not bar these types of claims because you're--you're entitled to argue coercion, the improper stacking, you know, the--the arguments we made at--if one claim has probable cause and the other doesn't, it's not a

full bar.

All those arguments were raised with Judge Cassell, he ruled on the legal issues, but we were forced to brief them again because the defendants brought them up again. So, again, had they taken a different approach, we would have taken a different approach.

Also, law of the case, one of the defenses, so to speak, or the responses that a party can do with respect to law of the case is, a party is totally allowed to argue that the prior ruling is erroneous. Now, remember, they say under res judicata, you're just stuck with it; but it is an actual, express argument that a party's entitled to make when it's law of the case. We could have taken that 35 or 40 pages of issues that Cassell had already ruled on where the law was already--of the case was already established, and we could have gone through and focused on convincing you that Judge Stewart's ruling was erroneous. You know, we've made some references to it, but we had to--we had, you know, the same space constraints that everyone does.

But--so that is another serious way, because remember, they say--and I think they're probably right--that arguing that the ruling is erroneous is not something that you typically are able to argue with res judicata.

Second--or we also would have been able to point out the different standards that apply to law of the case. And

here's an example. This--I did have time to just run law of the case and pulled up the most recent case on law of the case. It is two weeks old, obviously, it's not cited under the circumstances. It's called State vs. Ruiz, R-u-i-z, it was issued by the Court of Appeals on December 26th and the cite of it is 2008 Utah Appellate 470. The West Law cite, your Honor, is 2008 West Law 5376549. There is no P.3rd cite yet.

In that case, this--this Court of Appeals case actually completes negates what Mr. Morse postulated, which was that you would be--you're no more free to reconsider Judge Stewart's rulings than you would be to reconsider Judge--and I can't remember who he picked, I'll just say Hilder, or--or, you know, somebody--somebody else's rulings.

Well, actually, this case does the opposite. In this case, Judge Skanchy took over when Judge Fuchs retired, took over a case, there had already been a specific ruling by Judge Fuchs. Judge Skanchy did not agree with the ruling and so he opened it up again and ruled the opposite.

The defendant--this was a criminal case--the defendant said, hey, law of the case here. And the Court of Appeals said, you know, no, a judge can re-consider these rulings at any time.

The--in Paragraph 10 of this opinion, the Court said the law of the case doctrine is essentially a matter of

judicial economy rather than jurisdiction.

And then a little further down after the citation, a judge can change his or her mind any time up until the entry of final judgment, which is true, even if the judge has taken over the case from another judge as a trial court is not inexorably bound by its own precedent.

And there's been no final judgment in this case. there's been no final judgment on the State Constitutional claims. If you disagree with all or part of Judge Stewart's ruling, we think it's not only your option, but your obligation to--to say so and to do what you believe is correct under the Utah State law.

You know--you know what's ironic about the defendants' argument is that they say--I mean, Judge Stewart made a statement. He didn't just say, I'm dismissing for lack of jurisdiction under 13-67. He made an affirmative statement that he was not deciding the State issues, he was remanding them to State Court because they were important Constitutional issues that should be determined by the State Court.

And yet the defendants are saying, but at the same time, he tied you hands and said, oh, by the way, I've already made the ruling for you. Their oral argument doesn't comport with what Judge Stewart apparently contemplated, at least judging by that particular statement.

THE COURT: May I ask this?

MS. PORTER: Yes.

THE COURT: In terms of the distinction that might be made between any of the defendants, is there any? In terms of the--the motions that have been made--

MS. PORTER: Well--

THE COURT: --is there any distinction to be made?

MS. PORTER: --on--arguably one, two sets of defendants basically decided to hitch their whole wagon essentially to res judicata, at least two of them. I think Eisenman did, too, because her fact statement, all it did was refer back to the exhibits from Federal Court, did not provide any record to you in the State Court. So, Wagner and Alberton basically--in fact, that's all they did for their fact statement, as we pointed out. They have based it all on res judicata.

Anderson basically did the same thing, although they--they're trying to make an argument now, but again, not even providing you with a record, but simply saying, you know, here, you can just have what--you know, look at what Judge Stewart did.

I think the same thing is true of Eisenman, because all they did, they did not provide you with a separate State record, all they did was say, see, Wag--the doctors' exhibits, the only exhibits that they had that I believe that they were referring to were with respect to the Federal claim. I can't-